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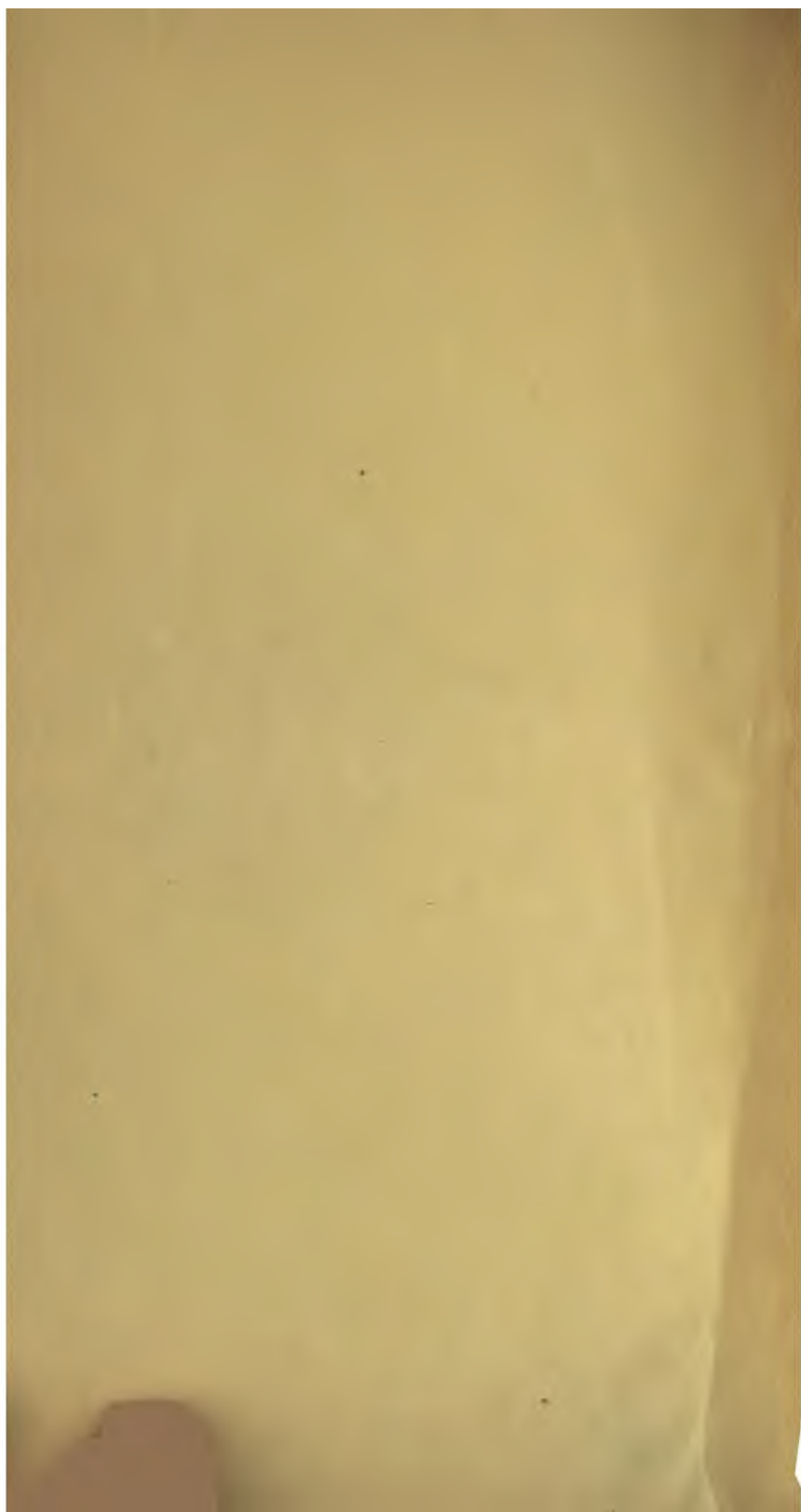


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THE LAW  
OF  
FREEDOM AND BONDAGE  
IN THE  
UNITED STATES.

BY  
JOHN CODMAN HURD,  
COUNSELLOR AT LAW.

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Moribus antiquis res stat Romana virisque.  
ENNIVS, apud Cic. *de Rep.*

IN TWO VOLUMES.

VOL. II.

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BOSTON:  
LITTLE, BROWN & COMPANY.

NEW YORK:  
D. VAN NOSTRAND.

M.DCCC.LXII.



*A13728*

ENTERED, according to Act of Congress, in the year 1862, by

JOHN CODMAN HURD,

In the Clerk's Office of the District Court of the United States, for the Southern  
District of New York.

BAKER & GODWIN, PRINTERS,  
Printing-House Square, opposite City Hall,  
NEW YORK.

## P R E F A C E .

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THE peaceful administration of private law by judicial tribunals involves the exercise of the supreme power of the state as much as does its assertion by the military force. The question—From whom does the law, upon which the relations of private persons depend, derive its authority?—is one which judicial tribunals are always answering, though the *investiture* of the supreme power is a fact which, in the nature of the case, cannot be determined by any exercise of the judicial function. A division of opinion upon this question can hardly be said to exist in any political community, unless it has been exhibited in a conflict of judicial decisions. If, in any community, opinions had been greatly divided on this question, an appeal to force could not have been distant. The presence of civil contest proves that in the United States a conflict of judicial opinion upon this question must have previously existed.

In the greater part of the cases cited in this volume it has been necessary for the judiciary to determine the operation of the first and second sections of the fourth Article of the Constitution of the United States. Under any view of the origin and operation of that Constitution, these provisions are distinguishable as having some important bearing on that portion of the private law of the United States which, in its effect, most nearly resembles international law. It is evident

that the judicial exposition of law which may be thus characterized involves, in an eminent degree, the recognition of the supreme or sovereign power in its actual investiture and exercise. A remarkable conflict of judicial opinion on the question of the investiture of sovereign power in the United and several States has been exhibited in the cases above spoken of.

That the courts of the slaveholding States, in concert with their other organs of public action, have long, with increasing unanimity and clearness, regarded the Constitution of the United States in the light of an international compact between the several States, as individuals originally possessing and continuously retaining all the attributes of independent national existence, will not be questioned by any at all conversant with the history of judicial decision. Has, then, the conflict of judicial opinion, above indicated, been exhibited only as one existing between the respective courts of the two geographical sections now arrayed against each other in the attitude of belligerents?

From the united action of the people of the Northern States in vindicating the nationality of that People of the United States in whose name the Constitution was declared, it might be inferred that the judiciary of the Northern States had maintained this view with a uniformity and distinctness equal to that of the Southern courts in supporting the contrary doctrine. But the opinions cited in this volume, in cases arising out of the existence of slavery, may show that, while Southern jurists have relied upon the State-Rights theory to maintain the claims of slave-owners and of the slaveholding States in these international or *quasi*-international cases, the courts and jurists of the Northern States, in maintaining freedom of condition against those claims, have, more especially within a few years past, with almost equal readi-

ness, resorted to the same theory of American public municipal law.

As, under this view, the Constitution exhibits less of the character of positive law and more that of a treaty, the legislative and executive functionaries of States, in both sections, have, at the same time, been induced more and more to claim cognizance of matters arising under those parts of the Constitution which, in effect, are most international. Hence, in the application of these provisions of the fourth Article to the relations of private persons, the legislative, executive, and judicial functions in the several State governments, instead of being combined in their ordinary co-ordinate action, have been more and more involved as competitors,—each in turn seeming to assume an incongruous prominence in asserting the interests of private persons as matters in which the States themselves were the parties claiming rights of and owing obligations towards each other as such.

It is in the agitation of The Slavery Question, almost exclusively, that those doctrines of State sovereignty have, during the last thirty years, been exhibited, upon which practical secession is claimed to be legitimate public action; and as those who were most opposed in their moral and political preferences in respect to slavery were at the same time almost in harmony on this subject, in view of totally different ends, it could be no occasion for surprise if these doctrines had been found to have gained greatly in acceptance, during that agitation, in the Northern as well as in the Southern States.

It may even have been that, among those who, by training, association, and public profession, had been most strongly bound to the recognition of an integral people of the United States and of political nationality co-ordinate with the existence of the States and supporting the Government of the Union, there were some who, studying the course of juristical



opinions, supposed a virtual revolution as having silently occurred by a change in the popular conception of the Union. Some such may have imagined a change, on the part of the people themselves, in the recognition of their own possession of sovereign power, as though the political nation had abandoned possession of those powers which, at the beginning, it had delegated to a national Government, while, simultaneously, those powers had passed to the States, severally, continuing to be exercised by a general Government, as by the delegation of those States; whereby the Government of the Union, ceasing to be a national Government, became a federal Government—the agent of a Confederacy, in the sense of a league of many, each intrinsically a distinct possessor of the sum of powers belonging to every sovereign nationality.

A change in the location of sovereign power, the time and manner of which should not be discernible except by the philosophic publicist, may be hardly possible even in theory; yet the idea of some such possible constitutional change may have so impressed many acute minds that, when the practical attitude of secession by a State came following on the theoretical assertion of State sovereignty, a necessary pause for recollection may have exhibited the aspect of acquiescence, on the part of the people of the Northern States, in the doctrine and its consequences.

It may be safely asserted, as matter of history, that from the very genesis of the Constitution the doctrine of a compact between the States has generally exhibited itself as in affinity with the doctrines of “the social compact,” of individual consent as underlying all the institutions of civil society, and of government as that which exists by the choice of the governed. When professed jurists would speak of revolution, or power to resist the Government, as a legal right—where high judicial authority might be cited for the assertion

that there are no subjects in republican governments—it was natural enough to question whether allegiance be any duty of the citizen. The existing works on public law are, for the most part, the production of men who wrote either under monarchies or in the interest of monarchy. There are probably now in other countries, and even in those islands where the Constitution of England is the law for king as well as people, some who hold that without royalty there can be no loyalty, and regard sedition, privy conspiracy, and rebellion as things which, by the nature of the case, can have no existence, as crimes, in republics, where the people rule. Among ourselves the doctrine of popular sovereignty has, of late years especially, been announced in propositions which would, logically, make the individual member of society independent of the governments which the people have established, and, practically, recognize a state in every chance aggregation in which the phenomenon of a numerical majority might be discernible.

In their reliance on the dogmas of this school, as in the predilection for State Rights, there was a remarkable resemblance between parties most diametrically opposed in action respecting slavery. The *a priori* assumptions upon which these doctrines were based are equally convenient to make a status natural or to make it unnatural; would throw the presumption of law and burden of proof with equal ease on either side of a legal controversy, and, as might be required, either carry the negro, as property, into unoccupied Territories, or invest him everywhere with the prerogatives of the citizen.

That such theories have been resorted to in supporting contrary interests in the slavery question, even when subjected to judicial discussion, may appear from cases given in the following pages.

It would require documentary proof of another class to

show that with these theories the kindred doctrine of a "higher law," by which all positive law, municipal or constitutional, private or public, should be measured, not only by the judiciary, but by the individual citizen, in calculating the limits of his obedience, was simultaneously embraced by the extremists of the respective advocates of both these contrary or contending interests; while such law has been as easily produced, when wanted, on either side, for attack or defence. In the name of a "higher law," the Acts of Congress prohibiting the African slave trade have been denounced before Southern legislatures and in Southern conventions, while, on Northern platforms and in Northern legislatures, another law of the same sort has been invoked to invalidate provisions of the national Constitution and legislation, whether State or national, devised to carry them into effect.

To a stranger, who, without knowing the history of these theories in weakening the popular perception of the foundation of our civil institutions, had observed the apparent quietude with which the first pretensions of seceding States had been received, the suddenness and emphasis with which the people of the Northern States asserted their belief in national existence might seem political inconsistency.

The legitimate consequences of such theories, when exhibited in State secession as practically asserted during the past year, must, sooner or later, have produced war, had they been the burden of the Constitution itself. Had not, by conscious or unconscious misleading, the whole subject of the foundation of government and law become obscured in the mind of the people of the Northern States, and had not this fact been observed and its consequences calculated upon, it is probable that none in the Southern would, at this time at least, have attempted to sever the national unity. For this

obscuration, the legal profession, and more particularly the judiciary, are principally responsible.

The subject of constitutional or public law has received, of late years, but little consideration from the profession, in comparison with that bestowed upon it at an earlier period,—and this though new questions under that law have been continuously presenting themselves upon which the earlier writers had bestowed little or no attention. The fourth Article has always been an “unexplored part of the Constitution.” The received commentators have hardly touched upon its provisions. This volume may be claimed to exhibit the first attempt at collating the various decisions bearing on the interpretation and construction of its several clauses, and deriving some general canons for their application in determining the rights and obligations of private persons.

It has been remarked by foreign jurists that there must be a portion of the private law of the United States which is like international law in its effect. As this portion is greatly determined by the clauses of the fourth Article, so it is obvious that they cannot be applied without judicial reference to the principles of international law, public and private, as received by all civilized nations. But, as yet, the judicial exposition of the international or quasi-international questions arising under this Article has not elicited any great degree of admiration in any quarter.

The attempt to exhibit these important provisions of the Constitution, upon which some of the leading decisions of the American courts have been founded, in connection with elementary doctrines of private international law, is a presumption on the part of the writer for which no excuse can be offered, if it be a presumption. The understanding of these clauses is, however, indispensable to the fair consideration of

the questions relating to slavery under the Constitution of the United States; and on these *scribimus, indocti doctique*.

The doubt will naturally suggest itself, whether the questions discussed in this work are not about to pass, or have not already passed, out of the sphere of juristical discussion, and are not now to be determined by the sword. That the present volume should be published under the existing state of public affairs, was certainly not foreseen by the writer when the work was begun. That these questions, in connection with public law, may be greatly modified by events presently occurring, need not be disputed: *qui vivra verra*. Every student of the history of jurisprudence knows, however, that private law is a very long-lived thing; one which even great revolutions are sometimes ineffectual to change. But whatever its consequences on the law of personal condition may be, it is certain that the opinions and decisions cited in this work are not the least among the causes of the existing civil contest.

NEW YORK, January, 1862.



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## CORRECTIONS.

- PAGE 1, lines 3 and 2 from the bottom of the text, *dele* "territorial jurisdictions and."
- PAGES 219, 220, *for* "State" and "States," where they occur in section 581, *read*, "state" and "states."
- PAGE 234, in the heading of the Chapter, *dele* "THE SUBJECT CONTINUED," and after "PROVISIONS," *insert*, "OF THE FIRST AND SECOND SECTIONS."
- PAGE 286, line 17 from top, *for* "499," *read*, "409."
- PAGE 361, line 19 from top, *after* "report," *insert*, "in 20 New York Reports."
- PAGE 373, line 19 from top, *for* "Himsley's," *read*, "Helmsley's."
- PAGE 381, line 13 from top, *for* "Ohio. The case is not as yet reported," *read*, "Ohio, 24 Howard, 66."
- PAGE 446, lines 12 and 13 from top, *for* "12 Wendell, Chief Justice Nelson," *read*, "12 Wendell, 311, Judge Nelson."
- PAGE 447, line 1 of text, *for* "311," *read*, "325," and line 1 of note, *for* "311," *read*, "319."
- PAGE 521, line 19 from top, *for* "3 Wisc., 157. In this decision the three," *read*, "3 Wisc., 157, the three."
- PAGE 554, line 23 from top, *for* "Nelson, Ch. J.," *read*, "Judge Nelson."
- PAGE 674, line 22 from top, *for* "(1858)," *read*, "(May, 1859)."
- PAGE 698, lines 5 and 7 from the beginning of the section, *dele* "demand or" and "demandant or."
- PAGE 703, line 1 of note 2, *for* "Hemsley's," *read*, "Helmsley's."
- PAGE 760, line 1 of text, *for* "ten," *read*, "nine."

# THE LAW OF FREEDOM AND BONDAGE.

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## CHAPTER XVII.

THE LOCAL MUNICIPAL LAWS OF THE UNITED STATES AFFECTING  
CONDITIONS OF FREEDOM AND ITS CONTRARIES. THE SUBJECT  
CONTINUED. LEGISLATION IN THE ORIGINAL THIRTEEN STATES ;  
THE STATES KENTUCKY, TENNESSEE, VERMONT, MAINE, AND  
THE DISTRICT OF COLUMBIA.

§ 540. In making that historical abstract of legislative action having the character of local municipal law in the United States which was proposed in the preceding chapter,<sup>1</sup> it will be convenient to classify the several States and Territorial Districts into three divisions, and present their several local statutory law in three corresponding chapters.

1. The first of these divisions will comprehend the original thirteen States, the District of Columbia, and the four States formed in territory which, before, had belonged to one of the older States.<sup>2</sup>

2. In the second will be classed the territorial jurisdictions and States formed in territory ceded to the United States by the older States.

<sup>1</sup> *Ante*, §§ 537-539.

<sup>2</sup> *Harcourt v. Gaillard*, 12 Wheat., 526:—at the close of the revolution “there was no territory within the United States that was claimed in any other right than that of some one of the confederated States.”

3. The third will comprehend the territorial jurisdictions and States formed in territory annexed to the preceding divisions by treaty or by conquest.

In this chapter will be given the statute law of the States included in the first division, arranged in the following order: Virginia, Kentucky (formed out of part of Virginia), Maryland, the District of Columbia (formed of parts of Virginia and Maryland), Massachusetts, Maine (formed of part of Massachusetts), New Hampshire, Vermont (formed of territory claimed by New Hampshire and New York), New York, New Jersey, Pennsylvania, Delaware, North Carolina, Tennessee (formed of part of North Carolina), South Carolina, and Georgia.

§ 541. LEGISLATION OF THE STATE OF VIRGINIA.

**1776**, c. 12. *An act for naval officers, &c.* A clause requires masters of vessels to take oath not to carry away "any debtors, servants, or slaves." 9 Hen. 186.

**1777**, 1st Sess. of the Commonwealth, c. 2. *On enlistments.* A clause forbids the enlisting of negroes and mulattoes without a certificate of freedom. 9 Hen. 280. —, c. 3. An act obliging "all free-born male inhabitants above the age of sixteen years, except imported servants during the time of their service," to take the oath of allegiance. Ib. 281.

**1778**, 3d Sess., c. 1. *An act preventing the farther importation of slaves.* Sec. 1. That "no slave or slaves shall hereafter be imported into this Commonwealth by sea or land, nor shall any slaves so imported be sold or bought by any person whatsoever." 3. The slaves so imported shall become free. 4. Excepts slaves brought in by persons removing from other States, provided they take an oath of intention, &c.; and by travelers and others "making a transient stay in this Commonwealth, bringing slaves with them for necessary attendance and carrying them out again." 6. Repeals so much of the act of 1753, c. 7, as comes within the purview of this act. 9 Hen. 471. Comp. Code of 1819. An exception in favor of South Carolina and Georgia during the war in 1780, c. 33. 10 Hen. 504.

**1779**, 3d. Sess., c. 1; 4th Sess., c. 24; relating to taxes,

provide a specific poll-tax on slaves capable of work. 10 Hen. 12, 166. —, c. 30, laying a tax on property, provides that it shall not "extend to any negro or mulatto servant or slaves." Ib. 189. —, c. 55. *An act declaring who shall be deemed citizens of this Commonwealth.* "That all white persons born within the territory," &c., shall be, &c. (See laws 1783, 1786, 1792-3.) "And all others, not being citizens of any of the United States of America, shall be deemed aliens;" provides—"The free white inhabitants of every of the States parties to the American Confederation, paupers, vagabonds and fugitives from justice excepted, shall be entitled to all rights, privileges and immunities of free citizens in this Commonwealth, and shall have free egress and regress to and from the same, and shall enjoy therein all the privileges of trade and commerce, subject to the same duties, impositions and restrictions as the citizens of this Commonwealth.<sup>1</sup> And if any person guilty of, or charged with, treason, felony, or other high misdemeanor in any of the said States, shall flee from justice and be found in this Commonwealth, he shall, upon the demand of the governor or executive power of the State from which he fled, be delivered up to be removed to the State having jurisdiction of his offence."<sup>2</sup> 10 Hen. 129. Rep. by 1783, c. 16.

1781, 6th S. c. 40. Tax law. Sec. 2, for a poll tax on white male persons above twenty-one years, and all slaves. 10 Hen. 504.

1782, 6th S. c. 8. *An act for the recovery of slaves, horses, and other property taken by the enemy*, 11 Hen. 23. —, c. 21. *An act to authorize manumission of slaves*,<sup>3</sup> sec. 1,

<sup>1</sup> The 4th of the Articles of Confederation, adopted July 9, 1778, reads—"The better to secure and perpetuate mutual friendship and intercourse among the people of the different States in this Union, the *free inhabitants* of each of these States, paupers, vagabonds, and fugitives from justice excepted, shall be entitled to all privileges and immunities of free citizens in the several States; and the *people* of each State shall have free ingress and regress to and from the same, and shall enjoy therein all the privileges of trade and commerce, subject to the same duties, impositions, and restrictions as the *inhabitants* thereof respectively, provided that such restrictions shall not extend so far as to prevent the removal of property imported into any State to any other State of which the owner is an inhabitant," &c.

<sup>2</sup> Following the terms of the 4th Article of Confederation.

<sup>3</sup> *Lewis v. Fullerton* (1817), 1 Rand. 15, manumission in Ohio not valid between master and slave domiciled in Virginia, unless according to law of Virginia;



authorizing manumission by will, adding that the slaves "shall thereupon be entirely and fully discharged from the performance of any contract entered into during servitude." (See law of 1805-6, c. 63, sec. 10.) Ib. 39. c. 32. *An act concerning slaves*, that if permitted to hire themselves out they may be sold by public authority. Ib. 59.

**1783**, c. 3. An act concerning the emancipation of certain slaves who have served as soldiers in this State. 11 Hen. 308. —, c. 16. *An act for the admission of emigrants and declaring their right to citizenship*. Sec. 1 declares "that all free persons born within the territory of this commonwealth," &c., shall be entitled to all the rights, privileges, and advantages of citizens. Sec. 4 repeals the act of 1779, c. 55. Ib. 323.

**1784**, c. 28. Amending the militia laws, sec. 8, duties of militia as "patrollers" in respect to negroes, &c. 11 Hen. 489.

**1785**, 10th S., c. 77. *An act concerning slaves*. Sec. 1. "That no person shall henceforth be slaves except such as were so on the first day of this present session, and the descendants of the females of them. Slaves which shall hereafter be brought into this commonwealth and kept therein one whole year together, or so long at different times as shall amount to one year, shall be free." Other sections contain ordinary provisions of a police nature. 12 Hen. 182. —, c. 78. *An act declaring what persons shall be deemed mulattoes*. "That every person of whose grandfathers or grandmothers any one is or shall have been a negro, although, &c., shall be deemed a mulatto, and so every person who shall have one fourth part or more of negro blood shall in like manner be deemed a mulatto." Ib. 184.<sup>1</sup> —, c. 83. *An act concerning servants*. White persons under compulsory service are referred to. Ib. 190. —, c. 84. *An act for apprehending and securing runaways*. Ib. 192.

**1786**, 11th S., c. 10. *An act to explain, &c.* Sec. 2, that "all free persons, born within the territory of this Commonwealth, all persons not being native who shall have, &c., shall

but, *Moses v. Deniger*, 6 Rand. 561, that emancipation by will, before 1792, c. 41, was unlawful. *Fulton v. Shaw*, 4 Rand. 597, condition that the issue of the emancipated shall be slaves is void; they are free.

<sup>1</sup> See *Gregory v. Baugh*, 4 Rand. 611.

be deemed citizens of this Commonwealth." 12 Hen. 261. —, c. 58. *An act directing the method of trying slaves charged with treason or felony.* Ib. 345.

**1787**, 12th S., c. 1. Revenue act, sec. 25, repeals poll tax on young slaves and on free white males. 12 Hen. 431. Other acts mentioning slaves as subject of poll tax in laws of 1784, see in 11 Hen. 93, 113, 418, 489. —, c. 37. Stealing or selling a free person for a slave, is made felony without clergy. 12 Hen. 531.

**1788**, c. 23. Repeals so much of the statute of 1723, c. 4, sec. 19, as declares killing a slave by correction to be manslaughter only. 12 Hen. 681.<sup>1</sup> —, c. 54, modifying the law against the importation of slaves, in favor of persons removing into that part of the State then known as Kentucky district.

**1792-3**, c. 41.<sup>2</sup> *An act to reduce into one the several acts concerning slaves, free negroes and mulattoes.* 1 Shepherd's continuation of Statutes at Large, 122. Sec. 43. "All negro and mulatto slaves, in all courts of judicature within this Commonwealth, shall be held, taken, and adjudged to be personal estate." (Compare law of 1748, c. 2, in vol. I., p. 243.) But the next section speaks of dower in slaves. (1 R. C. of 1819, p. 431.) — c. 48. *An act declaring, &c.* Sec. 1, that all free persons born within the State are citizens. 1 Shep. 148. —, c. 67. *An act reducing into one the several acts concerning servants.* Ib. 179.

**1793**, c. 22. *An act for regulating the police of towns and to restrain the practice of negroes going at large.* 1 Shep. 238. Another act on this, 1807, c. 13. 3 Shep. 372. —, c. 23. *An act to prevent the migration of free negroes and mulattoes into this Commonwealth.* 1 Shep. 239. Directs that they be apprehended and sent out of the State.

**1795**, c. 11. *An act to amend, &c.,* (i. e. the act of 1792, c. 41.) 1 Shep. 363. *Preamble.* "Whereas great and alarming mischiefs have arisen in other States of this Union, and are likely to arise in this, by voluntary associations of individuals who, under cover of effecting that justice towards

<sup>1</sup> See Souther's case (1851), 7 Grattan, 673.

<sup>2</sup> That the killing of outlawed slaves was not lawful after this date, see 5 Tucker's Blackstone, 178, note.



persons unwarrantably held in slavery which the sovereignty and duty of society alone ought to afford, have in many instances been the means of depriving masters of their property in slaves, and in others occasioned them heavy expenses in tedious and unfounded law-suits, to the end that a plain and easy mode may be pointed out by law for the recovery of freedom where it is unjustly and illegally denied, and that all such practices may in future be made useless and punished."

Sec. 1, 2. A person claiming to be "illegally detained as a slave in the possession of another," may make complaint to a magistrate who shall require bonds of the person detaining, and assign counsel, &c. 3. Penalty on any person aiding in the prosecution if the claim to freedom is not established. 4-6. Other amendments.

**1796**, c. 2. An amending act, 2 Shep. 19, makes it lawful for any citizen of the U. S. owning lands in the State, who may carry slaves into another State, to bring them back without incurring the penalties against importation, provided he had not sold or hired out such slaves, and provided always, "that if any such slave or slaves be entitled to freedom under the laws of that State to which he, she, or they may have been, or shall hereafter be removed, such right shall remain, anything in this act notwithstanding."

**1797**, c. 4. An amending act, 2 Shep. 77. Free persons convicted of exciting slaves to insurrection or murder shall suffer death. Penalty on harboring. Members of societies for emancipating slaves disqualified for jurors in suits for freedom. Penalties on masters of vessels, &c. —, c. 23, contains a penalty against negroes, &c., bond or free; selling goods, &c. Ib. 94.

**1798-9**, c. 6. That stealing a slave shall be punishable, capitally. 2 Shep. 147.

**1800**, c. 43. Slaves under sentence of death may be transported out of the United States. 2 Shep. 279. —, c. 70, against slaves hiring themselves. Slaves admissible as witnesses against free negroes, &c. Free negroes to be registered; operation of registry. Ib. 300. Additional as to registry is 1802, 31. Ib. 417.

**1801, c. 21.** Against dealing with slaves on vessels. 2 Shep. 326.

**1803, c. 97.** *An act authorizing the removal of slaves from the county of Alexandria, in the District of Columbia, into this Commonwealth.*<sup>1</sup> 3 Shep. 76, c. 119. *Declaring what shall be unlawful meetings of slaves.* 3 Shep. 108. Recites that it is a common practice "for slaves to assemble in considerable numbers, at meeting-houses and places of religious worship, in the nights, which if not restrained may be productive of considerable evil to the community;" provides for breaking up such and for punishment.

**1804, c. 11.** Amending the last general slave act. 3 Shep. 123. Sec. 1. Provides punishment by fine and imprisonment for carrying slaves out of the State without consent of owners. 2. That masters of vessels who, having slaves on board, shall sail out of the limits of the county, and persons traveling by land who shall protect or assist slaves, to prevent their being stopped, shall be within the act. 5. "That it shall not be lawful for the overseers of the poor who may hereafter bind out any black or mulatto orphan to require the master or mistress to teach such orphan reading, writing or arithmetic." —, c. 12. Amending and explaining the act of 1803, c. 119; it shall not prevent masters taking their slaves to places of religious worship conducted "by a regularly ordained or licensed white minister." Ib. 124.

**1805-6, c. 63.** An amending act, 3 Shep. 251. Slaves, if brought into the State and kept therein more than one year, shall be forfeited and sold. Other penalty for bringing in slaves. Sec. 10. That if slaves thereafter emancipated shall remain in the State more than twelve months thereafter they shall forfeit the right to freedom and be sold. (Act of 1815-16, c. 24, provides how emancipated slaves may remain in the county or corporate town on obtaining certificates.) —, c. 94. An act regulating free negroes, 2 Shep. 274, prohibits their carrying fire-arms without license.

**1806, c. 12.** Amending law of 1805, c. 63. 3 Shep. 290. Persons leaving the State with view to return may bring back

<sup>1</sup> See Law of 1788.

their slaves; rule, where the master's lands extend over the State boundary. Owners in other States may employ slaves to bring in produce for sale. An act of 1811, c. 14, permits citizens and residents of the State to bring in slaves from other States &c., when acquired by marriage, inheritance or devise.

**1807**, c. 24. A penal law, declares felony punishable with death for slaves wilfully burning barn, stable, &c.

**1812**.—An amending act (c. 106 in suppl. ed. of 1802 to Coll. of 1808) permits residents or persons immigrating to bring their slaves born within the United States on condition of producing certificate, &c., and provided that they shall, within three months after the importation of any slave, "export a female slave, above the age of ten years and under the age of thirty, for every slave imported."

**1819**.—A revised code,<sup>1</sup> c. 110, c. 111, relating to servants and slaves, and containing a digest of the earlier acts with modifications. —, c. 111, sec. 2, 3, permit the importation of slaves, born in any part of the United States, not convicted of crime. Code vol. 1, pp. 421, 422, where the earlier changes of legislative policy are noted. See code of 1849, p. 457.

**1820**, c. 32. An act making it "lawful to hire out free negroes and mulattoes for the payment of their taxes and levies." Code of '49, p. 468.

**1822**, c. 22. An act requiring an order of court for the sale of negro as runaway slave.

**1823-4**, c. 35. An act declaring penalty on free persons for enticing, &c., providing for search warrants, and that slaves may be confined by their masters in the county jail, &c. By act of 1828-9, c. 21, assisting slaves to escape is a misdemeanor punishable with imprisonment.

**1824-5**, c. 23. Rape of white by free negro, &c., punishable capitally. —, c. 45. Punishment of free negroes, &c., for larceny, by "stripes, sale, transportation, and banishment," and such person banished and returning shall suffer death as a felon. Act of 1827-8, c. 37, substitutes imprisonment in the

<sup>1</sup> Ch. 162 of the same code, sec. 5, empowers the governor, on the demand for a fugitive from justice, accompanied by copy of the indictment, or an affidavit certified by the demanding executive to be genuine, to deliver, &c. See code of 1839, c. 60, and code of 1849, c. 17, §§ 10, 15.

State penitentiary for punishment by "stripes, transportation, and sale."

**1826-7**, c. 26, sec. 1-6. Giving remedy by attachment against the vessel where a party has cause of action against the master for carrying away slave, &c. 7, 8. Sale of emancipated slaves, for remaining in the State, to be decided on by the court instead of overseers of the poor.

**1830**.—An amended Constitution. Bill of rights as before. By Art. III. sec. 14, the right of suffrage is limited to whites.

**1830-1**, c. 39. Amending the slave code. Sec. 3. Prohibits meetings for teaching free negroes or mulattoes reading or writing. 4. Penalty on whites for assembling with negroes for that purpose. 5. Penalty for assembling with slaves for such purpose, or teaching any slave for pay. (This, apparently, does not apply to the gratuitous instruction of slaves, nor prevent private instruction of free blacks by other persons of color.) Code of 1849, p. 747.

**1832**, c. 22. An amending act, contains new enactments against preaching by slaves and free negroes, and against slaves attending any preaching of a white minister, at night, without written permission. 3. "No free negro or mulatto shall hereafter be capable of purchasing or otherwise acquiring permanent ownership, except by descent, to any slave other than his or her husband, wife, or children." (Code of '49, p. 458.) 7. Punishment for writing or printing anything advising persons of color to rebel, &c. Code of 1849, p. 746.

**1834**, c. 68. Amending, prohibits the immigration of free negroes<sup>1</sup> and provides for corresponding precautionary and punitive measures, police regulations, &c. Code of 1849, p. 747.

**1836**, c. 66. *An act to suppress the circulation of incendiary publications, and for other purposes*, recites: "Whereas attempts have recently been made by certain abolition or anti-slavery societies, and evil disposed persons, being

<sup>1</sup> According to the Richmond Enquirer, Feb. 21, 1855, Mr. William Church having been arrested for violating this law, by bringing back to the State the woman Sylvia, whom he had carried with him to New York, from Virginia, where she had been his slave—they having been in New York twelve months,—the Mayor of Richmond discharged the prisoner on the ground that the woman was still a slave. Compare the proviso in the law of 1796, c. 2.



and residing in some of the non-slaveholding States, to interfere with the relations existing between master and slave in this State, and to excite in our colored population a spirit of insubordination, rebellion, and insurrection, by distributing among them, through the agency of the United States mail and other means, certain incendiary books, pamphlets, or other writings of an inflammatory and mischievous character and tendency." Sec. 1, declares the penalty of fine and imprisonment for any member or agent of any abolition or anti-slavery society, "who shall come into this State, and maintain, by speaking or writing, that the owners of slaves have no property in the same, or advocate or advise the abolition of slavery."<sup>1</sup> 2 Code of '49, p. 745. Penalty for writing, printing, or circulating works denying the right of the masters, and enticing persons of color to insurrection, provides that postmasters may give notice, &c., and "that any postmaster knowingly violating the provisions of this act shall forfeit," &c. Code, c. 198.

**1838, c. 99.** Enacting that free persons of color, leaving the limits of the State "for the purpose of being educated," shall not be permitted to return, &c. Code of '49, p. 747.

**1840-1, c. 72.** *An act to prevent the citizens of New York from carrying slaves out of this commonwealth, &c.* Sec. 1, 2. Prohibit the departure of any vessel owned or navigated by citizens of New York, or any vessel departing for New York, and not owned by a citizen of this State, before having been inspected, &c. 3. Security against violation of State law required. 4-11. Ancillary provisions. 12. Governor may suspend the law when notified that the Executive of New York will comply with the demand referred to, and that the law of New York, of May 6, 1840, entitled *An act to extend the right of trial by jury*, has been repealed.<sup>2</sup> This is amended in c. 88 of 1843, by substituting "willingness of the governor of New

<sup>1</sup> *Bacon v. The Commonw.* 7 Grattan, 602, as to evidence or indictment under this enactment. *Commonw. v. Barrett*, 9 Leigh, 665, the accused must be proved a member or agent of an abolition or anti-slavery society.

<sup>2</sup> Preamble and resolutions, March 17, 1840, relative to the demand by the Executive of Virginia upon the Executive of New York for the surrender of three fugitives from justice. See 2 Seward's Works, 502-518, and *post*, ch. XXV.

York to surrender fugitives from the justice of this State," for the condition above stated. The above acts are repealed, except as to the county of Accomac, by c. 96 of 1846.<sup>1</sup> See the present law as to vessels generally, Code, p. 730.

**1847-8.**—A criminal code, c. 2, sec. 5, provides punishment of death for advising or conspiring with a slave to rebel, &c. c. 10, *offences against public policy*. Sec. 22-40, contain re-enactment of former provisions. 22-24, impose duty, under penalty, on postmasters to give notice, to some justice, of books, &c., received, tending to insurrection; empowers justice to burn the same and to commit the receiver, &c. 34-37. Various provisions against free negroes remaining in the State under penalty of being sold. 38-40. Punishment of whites instructing slaves. Rev. Code, c. 194.<sup>1</sup>

**1849.**—The Revised Code in which the existing law on this subject appears to be substantially re-enacted in a more systematic arrangement; with marginal references to the original date of the law and to the cases.<sup>2</sup> See Title 30, *slaves and free negroes*, in several chapters, relates to their general condition. Title 54, *Crimes and punishments*; c. 198, *Offences against public policy*, sec. 22-40, and c. 200, *offences by negroes*. In c. 3, sec. 1, the right of citizenship of the State is limited to free white persons.

**1851.**—A Revised Constitution<sup>3</sup> preceded by the declaration of rights of June 12, 1776. Sec. V. art. 19, provides, "Slaves hereafter emancipated shall forfeit their freedom by remaining in the commonwealth more than twelve months after they become actually free, and shall be reduced to slavery under such regulations as may be prescribed by law."

<sup>1</sup> A negro slave is a person against whom a free person may commit the offence of malicious or unlawful shooting, stabbing, &c., under the act of 9th Feb., 1819, Carver's case, 5 Rand. 660. Dolly Chapple's case; 1 Vir. Cases 184, under an act of 1803.

<sup>2</sup> The historical notes of the compilers are also very valuable.

<sup>3</sup> By art 20, "the General Assembly may impose such restrictions and conditions as they shall deem proper on the power of slave owners to emancipate their slaves, and may pass acts for the relief of the commonwealth from the free negro population, by removal or otherwise." 21. "The General Assembly shall not emancipate any slave or the descendant of any slave, either before or after the birth of such descendant."



**1851.**—March 31. *An act to facilitate the recovery of fugitive slaves.* 1. That whenever a slave shall escape from his owner or person having him in possession, if the county or corporation court of the county, wherein such owner or person resides, be not in session, it shall be the duty of the sheriff or sergeant, upon request in writing of such owner or other person or his agent, to summon a court to meet forthwith at the court-house of such county or corporation, to hear proof of the escape of such slave, and that he owed service or labor to the owner or person aforesaid, and to order such proof to be entered on the records of such court, together with a general description of the slave so escaping, with such convenient certainty as may be pursuant to the provisions of the tenth section of the act of Congress concerning persons escaping from the service of their masters, passed eighteenth September, eighteen hundred and fifty. 2. The clerk of such county court and the sheriff of the county shall then and there attend upon said court, which may consist of two or more justices of such county, and the said court when so organized shall be a court of record, and may be adjourned from time to time until the proceedings are closed. The sheriff, sergeant, and clerk aforesaid, shall be authorized to charge the owner or person aforesaid such fees as are allowed by law for like services, and collect the same as other fees are collected by them respectively.

**1853, c. 55.** *An act establishing a colonization board and making an appropriation for the removal of free negroes from the commonwealth, i.e. to Liberia, and other parts of Africa.* Sec. 5 levies a poll-tax on every male free negro between twenty-one and fifty-five years, to raise a fund for this purpose. (See the temporary act of 1850, c. 6.)

**1856, c. 46.** *An act providing for the voluntary enslavement of the free negroes of this Commonwealth.* Allows negroes above the ages specified to petition the courts, in order to become slaves of such master as they shall designate; the master to pay into court one half valuation of such slave, and give security, &c. The status of their children, already born, is not affected. —, c. 47. *An act providing additional protection for the slave property of citizens of this Common-*

*wealth.* Relates to inspection of vessels leaving the State, &c. —, c. 48. Amends chapter 192 of the Code, increasing the penalties for the abduction of slaves, &c. —, c. 49. Amends chapter 105, by increasing rewards for the arrest of runaway slaves, including those in other States. —, c. 50. *An act to prohibit citizens of Virginia from hiring their slaves in the District of Columbia.* —, c. 51. *An act to prevent the sale of poisonous drugs to free negroes and slaves.*

**1858**, c. 29. *An act providing for the employment of negro convicts on the public works.* —, c. 47. Amending Code, c. 103, § 4, (see laws 1832, c. 22, § 3,) to read, "No free negro shall be capable of acquiring, except by descent, any slave." —, c. 62, and 1859, c. 36. Amending Code, in dealing with slaves.

**1859-60**, c. 54. An act authorizing the sale of free negroes into "absolute slavery" who are sentenced for offences "punishable by confinement in the penitentiary."

#### § 542. LEGISLATION OF THE STATE OF KENTUCKY.<sup>1</sup>

**1792**, April 19. Constitution adopted by Convention. In Art. 3, no distinction is made between "free male citizens" in respect to the elective franchise. Art. 12. A declaration of rights—contains no attribution of liberty as inherent, natural, or inalienable.<sup>2</sup> Sec. 1 declares "all men when they form a social compact are equal."

<sup>1</sup> *Baily et al. v. Poindexter*, 14 Grattan, 132: that slaves cannot elect to be free under a will declaring that they may elect between being emancipated or sold at public auction, because slaves have no legal capacity to choose. This case, decided January, 1858, may be referred to as a leading case on the status of slaves at the present time. *Adams v. Gilliam* (1855), 1 Patton and Heath, 161, that a will giving the choice to a slave to live with either of two persons mentioned, as he may from time to time prefer, is void. The law recognizes no condition between slavery and freedom.

<sup>2</sup> 1789, Dec., c. 18. An act of Virginia for the erection of the District of Kentucky into an independent State vests the elective franchise in the adult "free male inhabitants." 13 Hen. c. 14; 1 B. & D. 673. *An act declaring the consent of Congress that a new State be formed within the jurisdiction of the Commonwealth of Virginia and be admitted into this Union by the name of the State of Kentucky*, passed Feb. 4, 1791, recited the act of Virginia, and that "Whereas the people of the said District of Kentucky have petitioned Congress to assent," &c. 1 U. S. St. at L. 189; 2 B. & D. 191. No constitution for the State had as yet been framed. A convention in July, 1790, had voted unanimously in favor of a separation from Virginia; had fixed June 1, 1792, as the time; and had authorized the meeting of a convention to frame a State constitution. 1 Hildr. 2d Ser., 268.

<sup>3</sup> By Art. IX. the legislature is declared to have "no power to pass laws for the



**1792.**—An act to prohibit dealing with slaves. 1 Little's Dig., c. 44.

**1794.**—*An act concerning the importation and emancipation of slaves.* 1 Litt. c. 161. This is founded on Art. 9 of the Constitution. See 1 Litt. pp. 241–247, where also the earlier statutes of Virginia are given, as showing the former law of Kentucky, viz.: 1753, c. 2; 1778, c. 1; 1782, c. 21; 1785, c. 77, c. 78; 1786, c. 58; 1787, c. 37; 1788, c. 54; 1789, c. 45; 1790, c. 2.

**1798.**—*An act reducing into one the several acts concerning servants,* 2 Litt. c. 3, is like the laws of the older States.

**1798.**—*An act reducing into one the several acts for apprehending and securing runaways.* 2 Litt. c. 2. This is an act collected from the existing Virginia laws.

**1793.**—*An act to reduce into one the several acts respecting slaves, free negroes, mulattoes and Indians.* 2 Litt. c. 63, sec. 1. That none shall be slaves, except such as were slaves Oct. 15, 1785, and their descendants. 11. That if any negro, or mulatto, or Indian, bond or free, shall at any time lift his or her hand in opposition to any person not being a negro, &c., declared punishable, before a justice of the peace, with thirty lashes.<sup>1</sup> 23. Repeals all laws heretofore in force respecting the importation of slaves. 25. Is against the importation of slaves brought into

emancipation of slaves without consent of the owners or without first paying a full equivalent in money," nor "to prevent emigrants to this State from bringing with them such persons as are deemed slaves by the laws of any one of the United States, so long as any person of the same age or description shall be continued in slavery by the laws of this State; that they shall pass laws to permit the owners of slaves to emancipate them" with the usual restrictions; "they shall have full power to prevent slaves being brought into this State as merchandise;" and "to prevent any slave being brought into this State from a foreign country," or those who may have been since Jan. 1, 1789, or thereafter, imported into the United States." They are also empowered to pass laws to oblige the owners "to treat them with humanity, to provide them with necessary clothing and provisions, to abstain from all injuries to them extending to life or limb," and in case of neglect, &c., to have them "sold for the benefit of their owners."

<sup>1</sup> *Ely v. Thompson* (1820), 3 A. K. Marshall 73, this law, if not repealed by a later act on riots, &c., "as it subjects the free persons of color to punishment on the oath of the party, without trial, and without the possibility of contradicting and disproving his statements, is against both the letter and spirit of the State Constitution." The court says: "But we are still met by the argument that free persons of color are not parties to the political compact. This we cannot admit to the extent contended for. They are certainly, in some measure, parties. Although they have not every benefit or privilege which the Constitution secures, yet they have many secured by it. We need not take the trouble of inquiring how far they are or are not parties." The court also argues that aliens, though not parties any more, are yet protected by the Bill of Rights.

the United States from foreign countries. 26. That "no slave shall be imported into this State as merchandise," under penalty; but this is not to extend to immigrants who do not act in violation of sec. 25. By sec. 28, slaves shall be deemed real estate; but, by sec. 29, may be taken in execution.<sup>1</sup> This act contains a digest of the pre-existing law, and has, with amendments, continued to be the main act. Amending, as to disposal of slaves by will, are acts of 1800, c. 270, c. 282. An act of 1802, 3 Litt. c. 16, that slaves shall not be permitted to hire themselves out.

**1798.**—An act respecting the trial of slaves, 2 Litt. c. 144, provides for a jury before a court of three justices. An act of 1802-3 establishing circuit courts, constitutes five justices of the county court, with a jury, a court of oyer and terminer for the trial of slaves for capital crimes. See also 2 Litt. 308; 3 Litt. 399.

**1799.**—A new Constitution. The Bill of Rights declares all *freemen* equal when they form a social compact. Art. 2, sec. 8, limits the elective franchise to whites. Art. 8, sec. 1, excepts negroes, mulattoes, and Indians from militia service.\*

**1801.**<sup>2</sup>—An act that "slaves brought into this State for

<sup>1</sup> *Baltzell v. Hall*, 1 Littell's R. 99. "Slaves, by nature, are chattels, notwithstanding all statutory provisions declaring them real estate." And see *Carroll v. Connett*, 2 J. J. Marshall, Ky. R. 201.

<sup>2</sup> Art. X. sec. 1, corresponds with Art. IX. of the former. Sec. 2 provides that, "The General Assembly shall pass laws providing that any free negro or mulatto hereafter immigrating to, and any slave hereafter emancipated in and refusing to leave this State, or having left shall return and settle within this State, shall be deemed guilty of felony, and punished by confinement in the penitentiary therefor." (See act of 1807-8, sec. 3.) "In the prosecution of slaves for felony, no inquest by a grand jury shall be necessary, but the proceedings in such prosecutions shall be regulated by law, except that the General Assembly shall have no power to deprive them of the privilege of an impartial trial by a petit jury." (See *Jarman v. Patterson*, 7 Munroe, 645.)

<sup>3</sup> An act of 1803 respecting fugitives from justice, 3 Litt. 89; sec. 1, empowers the Governor to deliver up the person claimed when his identity has been determined by a justice. Supplemental is 3 Litt. 303. A new act in 1815, 5 Litt. c. 207, which devolves on the circuit judges the determination of the identity of the person demanded. An act of 1820, Sess. L. p. 856, is directed to the case of a demand from another State for a person who, on claim of ownership, should have removed from such State another as his slave alleged to have escaped from him. The act provides for a decision by a circuit judge, whether the person so removed by the person claimed as a fugitive from justice was the slave of the latter, and on that decision the person claimed by the other State is to be delivered up or discharged. M. & B. 745. See *State of Ohio v. Forbes and Armitage*, in 3 *Western Law Journal* (July, 1846), p. 370. An act of 1840, Sess. L. p. 114, authorizes the arrest, before demand made, of persons charged with crimes committed in other States. See 1 R. S. of 1860, 557, 8.



merchandise, or which shall be passing through this State, by land or water," if executed therein for felony, are not to be paid for. 2 Litt. c. 344.

**1808**, c. 13. *An act limiting actions in certain cases*, 2 Dig. 764. Reciting evils from dormant claims to freedom, founded on the effect of certain acts of Pennsylvania and Virginia on slaves formerly within their jurisdiction.<sup>1</sup> —, c. 17, Sess. L. *An act to prevent the future migration of free negroes and mulattoes into this State*. 3 Litt. 501. Prohibits the same and provides for the sale, for one year at a time, of such as may violate the provisions for their departure.

**1810**.—*An act for the more effectual preventing of crimes, conspiracies, and insurrections of slaves, free negroes and mulattoes, and for their better government*. 4 Litt. c. 235. Penalty of death declared for conspiracy to rebel, for poisoning, for rape on a white. (R. S. p. 638.) Trustees of towns, as well as justices, are empowered to punish slaves for misbehavior.

**1814**.—Amending the law as to importation and emancipation. 5 Litt. p. 293. Prohibits the importation of slaves except by persons intending to settle. See additional acts in 1818, Sess. L. p. 638; 1833, Sess. L. p. 258; M. & B. 1482; 1841, 1846, Sess. L. p. 70; 1849, Sess. L. p. 21; R. S. 629

**1815**.—An act giving owners a right of action against persons abusing their slaves, 5 Litt. c. 268. R. S. 634.

**1822**.—An act directing the legal forms to be followed in

<sup>1</sup> *Amy v. The State* (1822), 1 Litt. 326:—this act held not to violate either the State constitution or of that of the United States. The question principally considered was, who are citizens in view of the 4th art. of the Constitution of the United States. The majority of the court holding that blacks cannot be citizens; that plaintiff could not have been such in another State, "unless she belonged to a class of society upon which, by the institutions of the States, was conferred a right to enjoy all the privileges and immunities appertaining to the State;" that, from the general course of legislation and customary law in the several States, there is a presumption against any such being a citizen in any State. But it would seem that evidence might be given to show that it was so. *Ib.* 334. *Mills J.*, dissenting, held the plaintiff a citizen, if emancipated in Pennsylvania before the adoption of the Const. of the United States, but waived "the question whether any slave emancipated in any manner since the adoption of the federal constitution can become a citizen because born here; and whether any State can provide for the emancipation of these creatures so as to make them citizens while Congress holds the power of naturalization." *Ib.* 343. *Comp. Taney, Ch. J.*, 19 *How.* 418.

emancipation, Sess. L., p. 260. An act of 1823, Sess. L. c. 563, directs the county court, on the emancipation of slaves, to issue a certificate thereof. Acts of 1841, c. 92, 1842, c. 91, require bond against becoming chargeable, &c., to be taken thereafter, in cases of emancipation.<sup>1</sup>

**1823.**—*An act to prevent the removal of persons of color who may be bound to service.* 2 Morehead and Brown, 1293. An act of 1825, Sess. L. p. 137, provides for binding out poor free children of color. Sec. 4 of the same, that any negro not claimed as a slave may get free papers.<sup>2</sup> —. *An act to prevent masters of vessels and others from employing or removing persons of color from this State.* Assembly acts, c. 675. Additional is act of 1827, Sess. L. p. 178. An act of 1831, Sess. L. 54, enacts that ferrymen on the Ohio river shall not set slaves over from this State.

**1830.**—An act amending the slave code. 2 Mor. and Br. 1302, 1480, declares penalties for enticing away slaves,<sup>3</sup> for concealing or assisting them in escaping, directs that slaves, if inhumanly treated, shall be taken from their masters and sold to others. An act of 1840, Sess. L. 123, that free negroes, &c., concealing slaves, shall be punished by whipping.

**1834.**—An act that free persons of color convicted of vagrancy or keeping disorderly houses may be hired out for three months. 2 M. and B. 1221.

**1835.**—An act to secure the reward of persons apprehending fugitives, Sess. L. 436. Another of 1838, increases the reward in such case, Sess. L. 158. —. An act to prevent dower slaves being removed from the State, Sess. L. 361.

**1838.**—An act prohibiting slaves from traveling, Sess. L. 155.<sup>4</sup>

<sup>1</sup> *Ned v. Beal*, 2 Bibb. 298, issue of a woman who is by a will to be free, at a future time, born before that time are slaves. But the rule may depend on the question whether the condition of such woman is still that of chattel slave or of a legal person owing service. In the Roman law such persons (*statu liberi*, Dig. L. xl. t. 8, § 1) were still *res*, to whom the law of increase applied (Vol. I. p. 211, n.), but where bondage of a legal person has supervened, the doctrine may not apply. See Ruffin, J. in *Mayho v. Sears*, 3 Ired. 226; 1 Cobb on Slavery, 77, 78, and cases, and *post*, Del. law of 1810, and cases.

<sup>2</sup> *Gentry v. McMinnis*, 3 Dana, 382, all of not less than one-fourth negro blood presumed slaves.

<sup>3</sup> See in 2 West. L. Journ. 233, case of *Delia Webster*, in 1844.

<sup>4</sup> As to liability of stage proprietors, *Johnson &c., v. Bryan*, 1 B. Mun. 292.

**1840.**—An act regulating proceedings in suits for freedom, Sess. L. 172.

**1842.**—An act requiring jailors to advertise negroes arrested as runaway slaves, Sess. L. p. 76. Another act on the subject in 1851, Sess. L. 7.

**1846.**—An act that the enticing slaves to run away or inciting to rebellion shall be punished by imprisonment in the penitentiary, Sess. L. p. 21. —. An act that free negroes shall not manufacture or sell liquor, Sess. L. 54, R. S. of 1852, p. 643. Laws of 1856, Sess. L. 42, on sale of liquors, regulating slaves and free negroes.

**1850.**—An act making it a penal offence for any other than the owner to give a pass to a slave, Sess. L. p. 48; R. S. 634. —. A new Constitution. Art. II. sec. 8 limits elective franchise to whites. Art. XII. a bill of rights. Sec. 1. Declares the equality of "all freemen when they form a social compact." 2. Declares "that absolute arbitrary power over the lives, liberty, and property of freemen exists nowhere in a republic—not even in the largest majority." 3. Declares "the right of property is before and higher than any constitutional sanction; and the right of the owner of a slave to such slave and its increase is the same and as inviolable as the right of the owner of any property whatever." 4. "That all power is inherent in the people," &c., "that they have an inalienable right to alter, reform or abolish their government in such manner as they may think proper." In other sections rights are attributed to all "persons," and in others to all "citizens."<sup>1</sup>

**1852.**—Revised Statutes, c. 7. *Boats, &c.* Sec. 3. Liability as to escaped slaves.<sup>2</sup> Ch. 93, Tit. *Slaves, runaways, free negroes, and emancipation,*<sup>3</sup> contains the substance of the above laws. Art. 11 is an enactment against immigration of free negroes, in accordance with the constitutional direction, punishing such immigrating negroes by imprisonment on their remaining. Art. 1 declares "no persons shall be slaves in this State, except such as are now slaves by the laws of

<sup>1</sup> Art. X. corresponds with Art. X. of the preceding constitution.

<sup>2</sup> *Bracken v. Steamboat Gulnare*, 16 B. Munroe, 453.

<sup>3</sup> Cases on emancipation, in view of going to a free State,—*Anderson v. Crawford*, 15 B. Munroe, 339; *Noon's v. Patton's Adm.*, ib. 583; *Smith v. Adam*, 18 ib. 688.

this commonwealth, or some other State or Territory of the United States, or such free negroes as may hereafter be sold into slavery under the laws of this State, and the future descendants of such female slaves. 2. Every person who has one-fourth, or other larger part, of negro blood, shall be deemed a mulatto, and the word negro, when used in any statute, shall be construed to mean mulatto as well as negro." 3. Slaves, after this chapter takes effect, shall be deemed and held personal estate, &c. Amending are 1854, Sess. L. 163; 1856, Sess. L. p. 73; 1857-8, p. 5; and see R. S. of 1860.

§ 543. LEGISLATION OF THE STATE OF MARYLAND.

**1776**, Nov. 3. A Declaration of Rights. Art 3. "That the inhabitants of Maryland are entitled to the common law of England, &c., &c. In Art. 5, it is said, "Every man having property in, a common interest with, and an attachment to the community, ought to have a right of suffrage." There is no attribution of rights as inherent, natural, or inalienable. In Art. 17, "Every freeman" ought to have remedy, &c. In Art. 21, "No freeman ought to be taken," &c. By the Constitution, adopted Nov. 8, electors for delegates are "all freemen, residents," &c. An act of 1801, c. 90, altering the qualification, restricts suffrage to whites. See 1809, c. 83; 1810, c. 33.

**1783**, c. 23. *An act to prohibit the bringing of slaves into this State.* Temporary. Amending are, 1791, c. 57; 1794, c. 43, c. 66; a new act, 1796, c. 67.

**1790**, c. 9. Amending 1752, c. 1; and 1791, c. 75; concerning petitions for freedom; both rep. by 1796, c. 67.

**1787**, c. 33. Against slaves being permitted to hire themselves out. Suppl. see 1817, c. 104; see Code, Art. 66, §§ 26-31.

**1796**, c. 67. *An act relating to negroes, and to repeal, &c.* Prohibits introduction of slaves generally, but exceptions as to persons coming to reside. (Exceptions are made by many public and private acts of later date. See 1797, c. 15; 1798, c. 76; 1812, c. 76; 1813, c. 55; 1818-9, c. 201.) Sec. 5. Against voting, &c., by slave manumitted since, &c., and receiving their evidence against whites. 12, 13. Repeal 1752, c. 1, and allow manumission by will. 14. "Whereas it is contrary



to the dictates of humanity and the principles of the Christian religion to inflict personal penalties on children for the offence of their parents," &c., repeals law for the servitude of the issue of certain "inordinate copulations." (See *ante*, laws of 1715, c. 44; 1728, c. 4.) Other sections contain regulations common in slaveholding States. The last enumerates and repeals several acts passed since 1783 on the subject. This has been, with many amendments, the leading statute. Supplemental are 1804-5, c. 90; 1805, c. 66, c. 80; 1806-7, 81; 1807, c. 164.

**1801**, c. 109. Slaves are allowed to give evidence against free negroes charged with stealing. Amends 1751, c. 14, s. 4; confirmed by 1808, c. 81. (By Code of 1860, Art. 36, §§ 1, 3, negroes, slaves or free, are competent against negro, &c.; but never against whites.)

**1802-3**, c. 96. Relating to runaway servants and slaves; amended, by 1810, c. 63; 1817, c. 112, so as to guard against negroes being sold for expenses when not claimed as slaves.

**1804-5**, c. 90. Punishing runaway negro servants for years by extending their time. (On runaways, see Code, art. 66, §§ 3-11.)

**1805**, c. 66. Restricts the issue of certificates of freedom. —, c. 80. To prevent free negroes selling corn, wheat, and tobacco without license.

**1806**, c. 56. To prohibit the immigration of free negroes. Such persons not leaving on notice may be sold for time to pay expenses; not to extend to negroes employed in navigating vessels, and wagoning. (See Code, art. 66, §§ 44, 51.) —, c. 81. Negroes not to have guns, &c., and for apprehension of runaways; See 1833-4, c. 111; 1834-5, c. 160; and Code, art. 60, § 22.

**1808-9**, c. 81. Suppl. to 1715, c. 44. Admits testimony of slaves in prosecution of free negroes.

**1809**, c. 83. Elective franchise restricted to "free white male citizens," (confirmed by 1810, c. 33.) —, c. 138 on crimes, &c., sec. 2, death penalty for slaves or whites with them raising rebellion; imprisonment for years, for conspiracy. 21. Value of slave, executed or imprisoned, to be paid. (A suppl. act of 1818-9, c. 197, substitutes whipping and transportation for

imprisonment. See also 1819-20, c. 159.) —, c. 171. The condition of the issue born of female slaves during limited servitude, to be slaves, if not otherwise regulated by the manumitter of the mother.<sup>1</sup>

**1810**, c. 15. Relating to manumissions and to protect slaves, who are such for a limited time, from being sold out of the State. See 1817, c. 112; 1824-5, c. 85, 171, of like purpose. —, c. 63. For the free discharge of negroes imprisoned as runaways, when not claimed, &c. See 1817, c. 112.

**1814-5**, c. 92. Repeals 1728, c. 4.

**1817**, c. 227. For the protection of owners in certain counties, also 1820-1, c. 88, containing ordinary provisions.

**1818-9**, c. 157. (Suppl. to 1809, c. 138.) Punishment for enticing slaves to run away. Suppl. is 1827-8, c. 15; c. 208, limiting the use of jails by private owners.

**1821**, c. 240. Substitutes whipping as a punishment of slaves, instead of cropping the ears, as by 1723, c. 15.

**1825-6**,<sup>2</sup> c. 93. Free negroes, instead of being imprisoned for crimes are to be whipped, or may be sold for slaves for term of years, to be taken from the State; by 1826-7, c. 229, § 9, are to be imprisoned and then banished under penalty of being sold as slaves for term, &c.

**1831-2**, c. 281. *An act relating to the people of color in this State*, providing a board of managers, fund, &c., for the removal of free people of color to Liberia, in connection with the State Colonization Society. Suppl. are 1832-3, c. 145; c. 296, c. 316.<sup>3</sup>

**1831-2**, c. 323. *An act relating to free negroes and slaves*. Forbids introduction of slaves, either for sale or residence, and the immigration of free negroes (see Code, art. 66, §§ 44, 51); imposes many disabilities on the resident free people of color, and contains provisions tending to their removal and to induce emigration to Liberia. This was the leading act, amended by laws of 1832-3, c. 40; c. 317, which combine the exceptions

<sup>1</sup> See *ante*, p. 17, note 1.

<sup>2</sup> From 1821 to 1826 Resolutions were yearly passed by the legislature on the grievance in the encouragement given in Pennsylvania to the escape of slaves.

<sup>3</sup> It may be proper to observe here that the Am. Colonization Soc. is merely a private corporation under the law of the State.

to the prohibition against the introduction of slaves. Supplementary are, 1833-4, c. 87; c. 224; 1834-5, c. 75; c. 124; c. 284; 1835-6, c. 61, c. 200 s. 3, c. 325, c. 329; 1838-9, c. 69; 1839-40, c. 15, c. 35, c. 36, c. 38; 1841-2, c. 272, c. 323; 1842-3, c. 163, c. 213, c. 279, sec. 3, 4, c. 281; 1845-6, c. 94, c. 105, c. 153; 1846-7, c. 166, c. 355.

**1833-4**, c. 224. Extending the time of runaways, if slaves, for limited periods. Suppl. 1845, c. 105. See *Patterson v. Crookshanks*. 7 Gill, 211.

**1835-6**, c. 325. Makes the printing of papers calculated to excite and create discontent among the people of color a felony, and "high offence against the supremacy of this State."

**1836-7**,<sup>1</sup> c. 150. Against the navigation of vessels under the sole command of negroes, &c., extended by law of 1837-8, c. 23, and of 1853, c. 446. See Code, Art. 66, sec. 67.

**1838-9**, c. 63. *An act to provide for the recapture of fugitive slaves*, enacts that the running away of a slave into any State or the District, shall be felony; on conviction, the slave to be sold, purchaser being bound to remove him. (Code, Art. 30, §§ 174, 175.) Sec. 4. "That on evidence of the escape it shall be the duty of the governor to demand such slave from the chief executive authority of any State or Territory into which such slave may have escaped." Re-enacted in substance, by law of 1847-8, c. 309. See case of Mark, in Rollin C. Hurd on Habeas Corpus, &c., p. 601, and *post* ch. xxv.

**1841-2**,<sup>2</sup> c. 272. Making it felony for a free negro "to call for, demand, or receive," abolition papers, &c., and makes it a duty of grand juries to examine the postmasters, &c.

**1842-3**,<sup>3</sup> c. 163. Supplementary to the last; authorizes

<sup>1</sup> The law 1836-7, c. 197, is *An act to amend the Constitution and form of government of the State of Maryland*, to be effectual if confirmed by the General Assembly after the next election. Sec. 26. That the relation of master and slave shall not be abolished except by a bill passed with certain formalities, "nor then, without full compensation to the master for the property of which he shall be thereby deprived."

<sup>2</sup> A report, with resolutions, of April 6, 1841, relates to the controversy between New York and Virginia respecting fugitives from justice, supporting the view of Virginia.

<sup>3</sup> A resolution of Feb. 28, 1842, denies the power of Congress to abolish slavery in the District of Columbia; arguing from reservations made in the deeds of cession.

justices to search any free negro or mulatto suspected of having "abolition papers," &c., "using as little violence to the feelings of such free negro or mulatto as is compatible," &c. —, c. 281. *An act to prohibit the formation and assemblage of secret societies of negroes.* See Code, Art. 66, §§ 58–66; Art. 30, §§ 146–150.<sup>1</sup>

**1845–6**, c. 340. Recites that in case of slaves, "transportation or banishment is no adequate punishment for the higher grades of offences," &c.; enacts punishment as of other persons, reimbursement of owners, &c. Supplemental is, 1849–50, c. 124. But sale and transportation of negroes for crimes is restored by Code, Art. 30, §§ 194–200.

**1846–7**, c. 27. Removes the distinction made by sec. 2 of c. 13, of the act of 1717, between "persons professing the Christian religion and those not," &c., and enacts "that no negro or mulatto slave, free negro or mulatto, or any Indian slave or free Indian, natives of this or the neighboring States, be admitted and received as good and valid evidence in law in any matter or thing whatsoever that may hereafter be depending before any court of record or before any magistrate within this State, wherein any white person is concerned."

**1849**, c. 165. *An act to repeal all laws prohibiting the introduction of slaves into this State*,—with exception of slaves convicted for crimes. Penalties for bringing and buying such slaves. (See 1 Code of 1860, p. 450.) —, c. 296. Criminal law; new penalties for enticing slaves to run away.

**1851**, May. A new Constitution, adopted in Convention.<sup>2</sup> Decl. of Rights. Art. 1. Declares that "all government of right originates from the people, is founded on compact only," &c., and that the people have always the power to alter, &c.

<sup>1</sup> A resolution of Feb. 28, 1844, for application to Congress for a law making the rescue of fugitive slaves a criminal offence.

<sup>2</sup> Compare the alteration of the Constitution by the legislative act of 1837, c. 197. See opposite note 1.

Art. 21 of this Bill of Rights declares, "That no free man ought to be taken or imprisoned," &c., but "that nothing in this article shall be so construed as to prevent the legislature from passing all such laws for the government, regulation, and disposition of the free colored population of this State as they may deem necessary." Art. III. sec. 43, in the Constitution. "The legislature shall not pass any law abolishing the relation of master and slave as it now exists in this State."



Art. 5. "Every free white male citizen having the qualifications prescribed by the Constitution, ought to have the right of suffrage." The Constitution, Art. I. sec. 1, limits the franchise to "free white male persons."

1854, c. 273. An act imposing restrictions on free negroes and their employers in their contract for service. See Code, Art. 66, §§ 76-87.<sup>1</sup>

1858, c. 307. *An act to prevent slaves from gaining their freedom in certain cases.* Sec. 1. When freed under condition, under deed, or will,—condition must first be fulfilled. 2. To be manumitted only between certain ages. —, c. 356. *An act to prevent free negroes and slaves from having or using boats on the Potomac river.*

1860, c. 322. Amending the Code of Public General Laws.<sup>2</sup> Art. 65, sec. 42-46. "By adding thereto certain new sections prohibiting manumission of negro slaves, and authorizing free negroes to renounce their freedom and become slaves." The children under five years of a woman making such choice are to be slaves; if above five years, to be bound out. See Code, art. 66, § 43. —, c. 232. A local act for the principal counties gives them power to accept more stringent regulations of free negroes.

#### § 544. LEGISLATION OF THE DISTRICT OF COLUMBIA:<sup>3</sup>

1790. *An act for establishing the temporary and perma-*

<sup>1</sup> *Burke v. Joe*, 6 Gill & Johns. 136. In Maryland a negro is presumed to be a slave, and in suit for freedom must prove descent from free ancestor, or manumission. Also, *Hall v. Mullin*, 5 Har. & Johns. 190.

<sup>2</sup> In this code, published 1860, no title *Slaves* appears. The law respecting slaves is under the title *Negroes*. Art. 66, Sec. 1, is worthy of note for its phraseology. "Negroes have been held in slavery as the property of their owners from the earliest settlement thereof, and are and may be hereafter held in slavery as the property of their owners; and every owner of such negro is entitled to his service and labor for the life of such negro, except in cases where such negro can show that, by the grant or devise of the owner, or some former owner of such negro, or his or her maternal ancestor, a shorter period of service has been prescribed."

<sup>3</sup> The legislative power of Congress is derived from the provision in Art. 1, sec. 8, of the constitution, "Congress shall have power \* \* to exercise exclusive jurisdiction in all cases whatsoever over such district, not exceeding ten miles square, as may, by cession of particular States and the acceptance of Congress, become the seat of government of the United States." The residue of the paragraph is,— "and to exercise like authority over all places purchased by the consent of the legisla-

*ment seat of the government of the United States.* I. Stat. U. S. 130, sec. 1. "That a district of territory not exceeding ten miles square, to be located as hereafter directed, on the river Potomac, at some place between the mouths of the eastern branch and the Connogochegue, be and the same is hereby accepted for the permanent seat of the government of the United States, *provided nevertheless*, that the operation of the laws of the State [Md.] within such district shall not be affected by this acceptance until the time fixed for the removal of the government thereto, and until Congress shall otherwise by law provide." An amending act of 1791, I. St. U. S. 214, includes Alexandria town and county from Virginia in this act.<sup>1</sup> Retroceded in 1846.

**1801.**—*An act concerning the District of Columbia*, II. St. U. S. 103, sec. 1, that the laws of Virginia and Maryland respectively shall continue in force in the portions of the District ceded by them. — A supplementary act, II. St. U. S. 115, sec 6, "that in all cases where the constitution or laws of the United States provide that criminals and fugitives from justice or persons held to labor in any State escaping into another State shall be delivered up, the chief justice of the said district shall be and he is hereby empowered and required to

ture of the State in which the same shall be, for the erection of forts, magazines, arsenals, dockyards, and other needful buildings." But mere purchase of title for these purposes does not give jurisdiction to the United States. Story's Comm. § 1227 and citations. *Cohens v. Virginia*, 6 Wheat. 424, and Story's Comm. §§ 1228-1235, is a leading case on the nature of the power of Congress. It is therein held that the legislation of Congress for the District is not like that of a territorial legislature, local in its extent, but is the act of the legislature of the Union; and, it would seem, has national extent while derived from national authority, or that Congress may give it that extent. The question might occur in connection with the subject of this treatise, if Congress should enact a law determining the status of persons within the District, whether such law had beyond the District any greater effect than a State law would have. It seems too that the status of persons within the District rests now on national authority; as much so as if it had been there established by an act of Congress. The doctrine of *Cohens v. Virginia* would also require the law of the District, the forts, &c., to be classed with municipal law, having national authority and *national extent*, in that distribution of the laws of the U. S. which was made *ante*, Vol. I. p. 455, or that it should be separately classed as a law having local or national extent, according to circumstances.

Congress has entire control over the District for every purpose of government. There is no division of powers, as between the general and a State government. *Kendall v. the U. S.* 12 Peters, 524.

<sup>1</sup>The cession of the Maryland part of the District was made Dec. 23, 1788; of the Virginia portion, Dec. 3, 1789.

cause to be apprehended and delivered up such criminal fugitive from justice or person fleeing from service as the case may be, who shall be found within the District, in the same manner and under the same regulations as the executive authority of the several States are required to do the same; and executive and judicial officers are hereby required to obey all lawful precepts or other process issued for that purpose, and to be aiding and assisting in such delivery."

**1802.**—An amending act, II. Stat. U. S. 193, sec. 7, that no part of the laws of Virginia and Maryland to be in force in the District "shall ever be construed so as to prohibit the owners of slaves to hire them within, or remove them to the said district in the same way as was practised prior to the passage<sup>1</sup> of the last act." —. An act incorporating the inhabitants of Washington City, II. Stat. 195, sec. 2, confines the ballot to free whites. (1804, a supplementary act.) There is no mention made of slaves. Sec. 6. Among the powers of the corporation—"to restrain and prohibit the night and other disorderly meetings of slaves, free negroes, and mulattoes, and to punish such slaves by whipping not exceeding forty stripes, or by imprisonment not exceeding six calendar months for any one offence, and to punish such free negroes and mulattoes for such offences by fixed penalties, not exceeding twenty dollars for any one offence; and in case of inability of any such free negro or mulatto to pay and satisfy any such penalty and costs thereon, to cause such free negro or mulatto to be confined to labor for such reasonable time, not exceeding six calendar months, as may be deemed equivalent to such penalty and costs."

**1812.**—*An act to amend, &c.* II. Stat. U. S. 755, sec. 9. "That hereafter it shall be lawful for any inhabitant or inhabitants in either of the said counties, [of Washington and Alexandria,] owning and possessing any slave or slaves therein, to remove the same from one county into another and to exercise freely and fully all the rights of property in and over the said slave or slaves therein which would be exercised over him, her or them, in the county from whence the removal was made,

<sup>1</sup> But see *Butler v. Duvall*, 4 Cranch, 167. *Lee v. Lee*, 8 Peters, 44.

anything in the legislative acts in force at this time in either of the said counties to the contrary notwithstanding.”

**1831.**—*An act for the punishment of crimes in the District of Columbia.* IV. St. U. S. 448, sec. 15–18, speak of slaves being punishable as therein provided, though concluding with, “provided that this act shall not be construed to extend to slaves.” 17. Declares the offence of carrying off free negroes with intent to keep or sell as a slave, punishable with fine and imprisonment.

**1846.**—An act to retrocede Alexandria county to Virginia. IX. St. U. S. 35. Sec. 3. That the existing jurisdiction and laws shall continue until Virginia shall provide by law for the extension of her “jurisdiction and judicial system.” 4. Requires the assent of the inhabitants to the retrocession.

**1850, Sep. 20.** *An act to suppress the slave trade in the District of Columbia.*<sup>1</sup> IX. St. U. S. 467. *Be it, &c.*, “that from and after the first day of January, eighteen hundred and fifty-one, it shall not be lawful to bring into the District of Columbia any slave whatever for the purpose of being sold, or for the purpose of being placed in depot, to be subsequently transferred to any other State or place to be sold as merchandise; and if any slave shall be brought into the said District by its owner or by the authority or consent of its owner contrary to the provisions of this act, such slave shall thereupon become liberated and free. 2. *And be it, &c.*, that it shall and may be lawful for each of the corporations of the cities of Washington and Georgetown, from time to time and as often as may be necessary, to abate, break up, and abolish any depot or place of confinement of slaves brought into this District as merchandise, contrary to the provisions of this act, by such appropriate

<sup>1</sup> See the act of Congress of 1801, and the Maryland law of 1796, against importation. Also, *Lee v. Lee*, 8 Peters, 44.

<sup>2</sup> One of the so-called Compromise Acts of 1850. See vol. I., 563.

<sup>3</sup> So far as I am aware, this is the only act of legislation where this pronoun is thus used, where “his or her” is employed in the State laws.

A compilation by W. G. Snethen, 1848, is entitled *The Black Code of the District*. There is no general *Code* for the District. A code prepared by Judge Cranch, under authority of Congress, April 29, 1816, was published 1819, though never adopted. Another was rejected in 1855 by popular vote. A compilation was made, in 1831, by A. Davis. Another, by Mr. Thrift, is understood to be in course of publication.



means as may appear to either of the said corporations expedient and proper. And the same power is hereby vested in the Levy Court of Washington county, if any attempt shall be made, within its jurisdictional limits, to establish a depot or place of confinement for slaves brought into the said District as merchandise for sale contrary to this act."

§ 545. LEGISLATION OF THE STATE OF MASSACHUSETTS.<sup>1</sup>

**1780.** First Constitution of the State.<sup>2</sup> The preamble declares the enjoyment of "natural rights" to be one of the ends of government. Declaration of Rights, Art. 1, declares that "all men are born free and equal, and have certain natural, essential and inalienable rights, among which may be reckoned the right of enjoying and defending their lives and liberties; that of acquiring, possessing and protecting property, and in fine of seeking and obtaining their safety and happiness."<sup>3</sup>

<sup>1</sup> See Vol. I. p. 265. 3 Hildreth's Hist. p. 391. "In 1777, a prize ship from Jamaica, with several slaves on board, was brought into Salem by a privateer. The slaves were advertised for sale, but the General Court interfered and they were set at liberty."

<sup>2</sup> In Bradford's Hist. of Mass. p. 277, and appendix, it is said that in 1778, a Constitution was rejected by the people, and that "the greatest objection to it was that there was no bill of rights, or that the natural and inalienable rights of the people were not expressly reserved and secured."

<sup>3</sup> In *Betty & al. v. Horton* (1833), Court of Appeals of Virginia. 5 Leigh's Rep. 622. H. St. Geo. Tucker, President.—"The jury has found the Constitution of Massachusetts, containing a provision, like our own bill of rights, declaring 'all men born free and equal.' This it would seem is the only provision in the laws or Constitution of that State, upon this interesting subject. Looking to the actual state of that Commonwealth, and knowing, as we all know, that its slaves were few in number at the time of the adoption of its Constitution, we should be disposed to take this declaration less as an abstraction than we must regard that which is contained in our own bill of rights. We should readily extend it to mean at least as much as the common law, which does not recognize slavery as reconcilable with a residence upon British soil. I am inclined to think, however, it may go farther. The common law, I take it, is to be considered rather as declaring the mere *status* of the party, while in Great Britain, than in annulling the bond by which he is fettered, unless he asserts his right and establishes it by the adjudication of a competent tribunal. Then, indeed, it passes in *rem adjudicatum*; and upon well received principles of national [i. e. international] law this decision upon the *right* by a tribunal having complete jurisdiction over the subject, is conclusive everywhere. But, unless the right of the slave is so asserted and established, the common law has not the effect of knocking off his shackles; nor can it be invoked as his protector, upon his return to that country where he had formerly been a slave. Such, I incline to think, is the substance of the cases of *Williams v. Brown*, 3 Bos. and Pull. 69, and of 'the mongrel woman Grace,' decided by Lord Stowell, and mentioned by counsel and by Judge Green in *Hunter v. Fulcher*, 1 Leigh, 179, 181. In Massachusetts, however, it seems that the Constitution of the State must have been interpreted to have a more extensive operation, as it

**1786, June 22, c. 3.** *Act for the orderly solemnization of marriage.* Sec. 7. "No person authorized to marry shall join in marriage any white person with any negro, Indian, or mulatto, under penalty of fifty pounds; and all such marriages shall be absolutely null and void."

**1788, Mar. 25, c. 11.** *An act to prevent the slave-trade, and for granting relief to the families of such unhappy persons as may be kidnapped or decoyed away from this Commonwealth.* Enacts that "No citizen of this Commonwealth, or other person residing within the same," shall import, transport, buy, or sell, any of the inhabitants of Africa as slaves."<sup>1</sup> And

appears to have been decided, that the issue of a female slave, though born prior to the Constitution, was free; 2 Kent's Comm. 205. If this be so the Constitution has received an interpretation which goes to divest the title of the master to break the bonds of the slave and to annul the condition of servitude. It emancipates and sets free by its own force and efficacy, and does not wait the enforcement of its principles by judicial decision. It is more operative than the common law and more resembles the effect of our statute, declaring free all slaves imported contrary to law. But this depends upon the construction of the Constitution of Massachusetts by its courts, which we would of course respect and follow, if we were sufficiently advised of them. But, without their reports here, we should perhaps venture too far to rest our decision upon the Massachusetts Constitution. It is not deemed necessary," &c. In this case the question was of the freedom of slaves who had been brought back to Virginia after being taken to Massachusetts. They were held free.

<sup>1</sup> Mention has already been made (Vol. I. 264, n.) of suits brought, before the Revolution, in Massachusetts, for freedom by negroes held in slavery, in some of which it was urged that no person born in the colony could be a slave. In the case of *Inhabitants of Winchendon v. Inhabitants of Hatfield*, 4 Mass. 128, decided in 1808, Parsons, Ch. J., said—"In an action by the *Inhabitants of Littleton*, brought to recover the expenses of maintaining a negro against Tuttle, his former reputed master, tried in Middlesex, October term, 1796, the Chief Justice, in charging the jury, stated, as the unanimous opinion of the court, that a negro born in the State before the present Constitution (1780) was born free, although born of a female slave." But Judge Parsons added, "It is, however, very certain that the general practice and common usage had been opposed to this opinion." And his decision of the case, which regarded the settlement of a negro pauper, is based upon the fact that he was a slave in 1776; but it does not appear whether he was or was not a native of the colony.

It seems that within a year or two after the adoption of this Constitution, the general question of the legality of slavery in Massachusetts was brought before the courts, but no contemporaneous report of the decisions appears to be extant. 3 Hildr. 391. In *Winchendon v. Hatfield*, Parsons, Ch. J., said—"Slavery was introduced into this country soon after its first settlement, and was tolerated until the ratification of the present Constitution. The slave was the property of his master, subject to his orders and to reasonable correction for misbehavior, was transferable, like a chattel, by gift or sale, and was assets in the hands of his executor or administrator. If the master was guilty of cruel or unreasonable castigation of his slave, he was liable to be punished for the breach of the peace; and I believe the slave was allowed to demand sureties of the peace against a violent and barbarous master, which generally caused a sale to another master. And the issue of the female slave, according to the maxim of the civil law, was the property



whereas divers peaceable inhabitants of this Commonwealth, or residents therein, have been privately carried off by force, or decoyed away under various pretences, by evil-minded persons, and with a probable intention of being sold as slaves without the same; and though sufficient provision is made for public justice in such case by common law, and an act establishing the right to and the form of the writ *de homine replegiando*,<sup>1</sup> yet no provision is made for bringing actions for damages by the friends or families of any inhabitants who may

of her master. Under these regulations the treatment of slaves was in general mild and humane, and they suffered hardships not greater than hired servants. Slaves were sometimes permitted to enjoy some privileges as a *peculium*, with the profits of which they were enabled to purchase their manumission; and liberty was frequently granted to a faithful slave by the bounty of the master, sometimes in his life, but more commonly by his last will. Several negroes born in this country of imported slaves demanded their freedom of their masters by suit at law, and obtained it by a judgment of court. The defence of the master was faintly made, for, such was the temper of the times, that a restless, discontented slave was worth little; and when his freedom was obtained in a course of legal proceedings, the master was not holden for his future support if he became poor. But in the first action, involving the right of the master, which came before the Supreme Judicial Court, after the establishment of the Constitution, the judges declared that by virtue of the first article of the Declaration of Rights, slavery in this State was no more."

In *Inhabitants of Andover v. Inhabitants of Canton* (1816), 13 Mass. 551, Parker, Ch. J., said—"Indeed, we find the court, early after the adoption of our Constitution, deciding, not only that slavery was virtually abolished by that Constitution, but that the issue of two slaves born in wedlock in the year 1773 was born free,—probably upon the principle that, although slaves acquired in a foreign country might remain bound during their lives, yet that in a free country they could not transmit their slavery to their posterity. This was settled in the case of *Littleton v. Tuttle*. The practice, however, was, as suggested by Chief Justice Parsons, in his comments upon that case, to consider such issue as slaves, and the property of the master of the parents, liable to be sold and transferred like other chattels, and as assets in the hands of executors and administrators."

In *Lanesborough v. Westfield* (1819), 16 Mass. 75, Judge Parker seems to justify the decisions on the following—"By the colonial law of 1646, no bond-slavery could exist, except in the case of lawful captives taken in just war, or such as willingly sold themselves or were sold to the inhabitants (Ancient Charters, &c. See in Vol. I., p. 260); of course the children of those who in fact were, or who were reputed to be, slaves, not coming within the description, could not be held as slaves."

Mr. Washburn, in the paper mentioned Vol. I., p. 264, has described three suits occurring in 1781, involving the status of a negro named Quork Walker, "in which, by a verdict of a jury, with the approbation of the highest court, it was decided authoritatively that slavery no longer existed in Massachusetts." Mr. Washburn has transcribed the substance of the brief used by the counsel for the negro before the jury in the higher court. He supposes that the illegality of slavery was not attributed mainly to the operation of the Constitution of 1780. There is, however, in the brief, as described by him, little or nothing else to rest on that can be called *law*, if the definitions adopted in the commencement of this treatise are correct.

<sup>1</sup> Law of 1787, Feb. 19, enacts that every person imprisoned is entitled to the writ.

be carried off,"—provides that any friend may bring an action in the name of the inhabitant carried off, under bonds to apply the money recovered to the benefit of the family of the person, &c.

**1788**, March 26, c. 21.<sup>1</sup> *Act for suppressing rogues, vagabonds, &c.*, the last section of which enacts: "No person being an African or negro, other than a subject of the emperor of Morocco, or a citizen of some one of the United States, to be evidenced by a certificate from the secretary of the State of which he shall be a citizen, shall tarry within this Commonwealth for a longer time than two months, and upon complaint made to any justice of the peace within this Commonwealth that any such person has been within the same more than two months, the said justice shall order the said person to depart out of this Commonwealth, and in case that the said African or negro shall not depart as aforesaid, any justice of the peace within this Commonwealth, upon complaint and proof made that such person has continued within this Commonwealth ten days after notice given him or her to depart as aforesaid, shall commit the said person to any house of correction within the county, there to be kept to hard labor agreeably to the rules and orders of the said house, until the session of the Peace next to be holden within and for the said county; and the master of the said house of correction is hereby required and directed to transmit an attested copy of the warrant of commitment to the said court on the first day of their said session, and if upon trial at the said court it shall be made to appear that the said person has thus continued within this Commonwealth contrary to the tenor of this act, he or she shall be whipped not exceeding ten stripes, and ordered to depart out of this Commonwealth within ten days; and if he or she shall not so depart, the same process shall be had, and punishment inflicted, and so *toties quoties*."

**1834**,<sup>2</sup> c. 177. An act for the orderly solemnization of mar-

<sup>1</sup> Constitution of the U. S. adopted by Mass. Sept. 13, 1788.

<sup>2</sup> 1834, c. 155, vol. 13, Gen. L. *An act in addition to the acts relating to fugitives from justice.* Sec. 2. Prescribes the duty of the Governor and Attorney General to consult, and empowers the Governor to issue warrant for delivery and removal. See R. S. c. 142, sec. 7-11. Held constitutional in *Commonw. v. Tracy*, 5 Metcalf, 536.



riages, repealing former acts, but excepting sec. 7 of the act of 1786. Same law, R. S. c. 75, s. 5; c. 76, s. 1.

**1843,**<sup>1</sup> ch. 5. *An act relating to marriages between individuals of certain races.* Repeals provisions of R. S. against intermarriage of whites, negroes, &c.

—, c. 69. *An act further to protect personal liberty.*<sup>2</sup>

Sec. 1. No judge or justice to take cognizance of any case under act of Congress, Feb. 12, 1793. 2. No sheriff or other officer shall arrest, or detain, or aid in arresting or detaining in any public building belonging to the commonwealth, any person claimed as a fugitive slave. 3. Any justice, &c., violating this act, to forfeit a sum, &c., or be imprisoned, &c. General Stats. c. 144, §§ 58–67.

**1855,** c. 489. *An act to protect the rights and liberties of the people of the Commonwealth of Massachusetts.* Sec. 1. All the provisions of the Act further to protect, &c. (of 1843), shall apply to the act of Congress of Sept. 18, 1850, relating to fugitives from labor. 2. The 111th ch. of R. S. declared to mean that every person imprisoned, &c., is entitled to the writ of habeas corpus, except in the cases mentioned in the second section of that chapter. 3. What courts may issue the writ. 4. On demand of either party, a trial by jury shall be ordered, if from return it shall appear that the person detained is claimed as a fugitive from service in another State. 5. Jury how summoned. 6. Claimants to make statement in writing. Burden of proof to be on claimant. 7. Declares that any who shall remove any person being in the peace of the Commonwealth, “who is not ‘held to service or labor’ by the ‘party’ making ‘claim,’ or who has not ‘escaped’ from the ‘party’ making ‘claim,’ or whose ‘service or labor’ is not ‘due’ to the ‘party’ making ‘claim,’ within the meaning of those words in the Con-

<sup>1</sup> Resolve of 1839, April 8. Preamble. “Whereas, under the laws of several States of the Union, citizens of this Commonwealth visiting those States for purposes of business, or driven thither by misfortune, often have been and continue to be, though guiltless of crime, cast into prison, subjected to onerous fines, and in many instances sold into slavery; therefore,” &c.

<sup>2</sup> The common-law writ *de homine replegiando* had been abolished. See R. S. of 1836, c. 111, s. 38. It was restored by law of 1837, c. 221,—*An act to restore the trial by jury on questions of personal freedom.* No exception is made as to persons claimed as fugitives from labor or from justice. General Laws, c. 144, §§ 42–67.

stitution of the United States, on the pretence that such person" is so held and has escaped, shall be punished by fine and imprisonment. 8. Persons sustaining the injury above specified may sustain action for damages. 9. No person holding any office under the State may issue warrant or process, or grant certificate, under the laws of Congress of 1793 and 1850. 10. Penalty by loss of office and future disqualification. 11. Attorney for claimants of fugitives disqualified from acting thereafter as counsel or attorney in the State courts. 12. The preceding two sections not to apply to removal from judicial office, but the performance of the actions therein specified shall be sufficient for impeachment, as violation of good behavior. 13. No person qualified to issue warrant and certificate, in virtue of office under the United States, may at the same time hold office under the State. 14. Judicial officers who continue to hold the office of U. S. Commissioner deemed to violate good behavior, and made liable to removal. 15. State officers, sheriffs, &c., declared punishable by fine and imprisonment for arresting persons claimed as fugitives. 16. The volunteer militia forbidden to act in seizing, &c., and declared punishable in like manner. 17. The governor to appoint county commissioners to defend persons claimed as fugitives. 18. To be paid by the State. 19. State jails not to be used for the detention of persons claimed. 20. Habeas-corpus laws to apply to these cases. 21. Act declared not applicable to fugitives from justice.<sup>1</sup> 22. Inconsistent acts repealed.<sup>2</sup>

**1858, c. 175.** An act to amend the above. Sec. 1. Forbids the tenure of judicial office under the State, except the office of justice of the peace, by persons holding such office under the United States, or the office of United States Commissioner, and forbids any justice holding the latter office to issue any process or try cause. 2. Limits the fifteenth and sixteenth

<sup>1</sup> *An act in relation to fugitives from justice*, Laws of 1857, c. 289, provides that person arrested as such shall not be delivered up "until he shall have been notified of the demand made for his surrender, and shall have had opportunity to apply for a writ of habeas corpus, if he shall claim such right of the officer making the arrest. The act of 1869, c. 81, prescribes the evidence without which such delivery shall not be made. Gen'l Stat. ch. 177, §§ 1-3.

<sup>2</sup> Returned by the governor (Gardner), with objections, and passed by a two-third vote of both branches of the Assembly.

sections of the amended act. 3. Repeals the tenth, eleventh, thirteenth, and fourteenth sections. Gen'l Stats. c. 144, § 67.

§ 546. LEGISLATION OF THE STATE OF MAINE.<sup>1</sup>

**1819.**—State Constitution adopted by a convention. Art. 1, sec. 1. That "all men are born equally free and independent, and have certain natural," &c., &c. In some sections rights are attributed to "every citizen," in others, to "every person." Art. II. sec. 1, declaring the elective franchise, makes no distinction of color. The militia law of 1821 specifies whites as liable to duty. R. S. of 1821, ch. 144, § 1.

**1821.**—*An act for the protection of the personal liberty of the citizens and for other purposes.*<sup>2</sup> R. S. of 1821, c. 22, sec. 1. Declares the punishment for removing "any person lawfully residing and inhabiting therein to any part or place without the limits of the same without his consent," except for military defence or when "sent by due course of law to answer for some criminal offence." No special reference is made to fugitive slaves. — A law regulating marriage, declares "all marriages between a white person and any negro, Indian, or mulatto shall be absolutely void." R. S. of 1821, c. 70, § 2. R. S. of 1847, c. 59, sec. 3.

**1838,** c. 323. *An act against kidnapping or selling for a slave,* "without lawful authority." R. S. of 1857, c. 118, § 19.

**1855,** c. 182. *An act further to protect personal liberty.* Sec. 1. State judges and justices of the peace forbidden to take cognizance of cases under Acts of Congress of 1793 and 1850. 2. Sheriffs, &c., shall not assist in arresting those claimed as slaves. 3. Penalty on justices of the peace, sheriff, &c. 4. Not to be construed to affect officers of the United States. Additional is c. 43 of 1857, making it the duty of the county attorney to defend persons claimed as slaves. But these acts appear

<sup>1</sup> Act of Congress for the admission of Maine into the Union, March 3, 1820. III. Stat. U. S. 544.

<sup>2</sup> An act of 1821 and of 1838, c. 330, authorize the governor to deliver up persons charged as fugitives from justice. R. S. of 1821, c. 113, § 2; R. S. of 1840, c. 174, § 2; R. S. of 1857, c. 138, § 5. In the index to R. S. of 1830-33, the titles *slaves, negroes, &c.*, do not appear.

to have been repealed by R. S. of 1857, in which only the penalties on sheriffs, &c., for aiding in the arrest, &c., of persons claimed as fugitive slaves are retained. See R. S. c. 80, § 53.

**1857**, c. 53. *An act declaring all slaves brought by their masters into this State free, and to punish any attempt to exercise authority over them.* R. S. of 1857, c. 118, § 29.

§ 547. LEGISLATION OF THE STATE OF NEW HAMPSHIRE.<sup>1</sup>

**1783.** Constitution adopted; with Bill of Rights declaring Art. 1. "All men are born equally free and independent; therefore, all government of right originates from the people, is founded in consent and instituted for the general good." 2. "All men have certain natural, essential, and inherent rights; among which are the enjoying and defending life and liberty, acquiring, possessing, and protecting property, and, in a word, seeking and obtaining happiness." 3. "When men enter into a state of society they surrender up some of their natural rights to that society in order to ensure the protection of others; and without such an equivalent the surrender is void." 4. "Among the natural rights some are in their very nature inalienable, because no equivalent can be given or received for them. Of this kind are the rights of conscience." 12. "Every member of the community has a right to be protected by it in the enjoyment of his life, liberty, and property," &c. Other attributions of rights are made in language applying to all natural persons.

A new Constitution was adopted Sep. 5, 1792, with the same Bill of Rights. The only amendment thereafter was the abolition, in 1852, of certain property qualifications for office. See Compiled Laws of 1853.

There appears not to have been any action of the legislative department in reference to slavery. Its unlawfulness in New Hampshire must be caused by this Bill of Rights; or here, as in Massachusetts, it may be said that slavery was abolished by the Constitution.<sup>2</sup> 1792, Dec. 28, a militia law specifies white

<sup>1</sup> 1776, Sept. 11. *An act to adopt and take the name, stile, and title of State in lieu of Colony in New Hampshire*, enacted "by the council and assembly." Laws ed. Exeter 1780.

A State Constitution proposed by a convention in 1779, was rejected by a vote of the people. Coll. N. H. Hist. Soc. p. 155.

<sup>2</sup> 1 Hildreth Hist. U. S. 2d ser. 175. In the index to the N. H. Body of Laws, published 1792, the words *negro, mulatto, Indian, slave, servant*, are not found. The



persons as subject to enrollment. The law of 1857 makes no distinction.

**1857.**—*An act to secure freedom and the rights of citizenship to persons in this State.*<sup>1</sup> Laws, c. 1955. Sec. 1. Enacts "that neither descent, near or remote, from a person of African blood, whether such person is or may have been a slave, nor color of skin, shall disqualify any person from becoming a citizen of this State, or deprive such person of the full rights and privileges of a citizen thereof. 2. Any slave who shall come or be brought into, or be in this State, with the consent of his master or mistress, or who shall come, or be brought into, or be in this State, involuntarily, shall be free. 3. Every person who shall hold, or attempt to hold in this State in slavery, or as a slave, any person of whatever color, class, or condition, in any form, or under any pretence, or for any length of time, shall be deemed guilty of felony, and on conviction thereof, shall be confined to hard labor for a term of not less than one, nor more than five years: Provided that the provisions of this section shall not apply to any act lawfully done by any officer of the United States, or other person in the execution of any legal process. 4. Section first, of chapter twenty-five of the Compiled Statutes<sup>2</sup> shall not be so construed as in any case to deprive any person of color or of African descent, born within the limits of the United States and having the other requisite qualifications, from voting at any election; but such person shall have and exercise the right of suffrage as fully and lawfully as persons of the white race."

§ 548. LEGISLATION OF THE STATE OF VERMONT.<sup>3</sup>

**1777**, July 2. Constitution.<sup>4</sup> Chap. I. is a declaration of

statutes on marriage make no distinctions founded on color. On the law of kidnapping, see *State v. Rollins*, 8 N. H. 550.

<sup>1</sup> In the Rev. Statutes of 1842, ch. 223, and the Compiled Statutes of 1853, ch. 238,—*Of fugitives from justice*, the governor of the State is empowered to make the surrender of persons charged with crimes in other States.

<sup>2</sup> Which provides that "every male inhabitant of each town, being a native or naturalized citizen of the United States, of the age," &c., &c.

<sup>3</sup> For the history of the conflicting claims of New York and New Hampshire and the establishment of an independent State Government, see *Vermont State Papers*, 8vo. ed. 1823.

<sup>4</sup> Established by Convention without being then submitted to the electors for ratification, see *Vt. St. P.* p. 241; but afterwards ratified, with some amendments in 1793; see note to *Compiled Laws of 1850*, p. 47.

the rights of the inhabitants of the State of Vermont. Art. 1. "That all men are born equally free and independent, and have certain natural, inherent, and unalienable rights, amongst which are the enjoying and defending life and liberty; acquiring, possessing, and protecting property, and pursuing and obtaining happiness and safety. Therefore, no male person, born in this country, or brought from over sea, ought to be holden by law to serve any person, as a servant, slave, or apprentice, after he arrives at the age of twenty-one years, nor female, in like manner, after she arrives to the age of eighteen years, unless they are bound by their own consent, after they arrive to such age, or bound by law, for the payment of debts, damages, fines, costs or the like." Ch. II. Art. 18, gives the elective franchise without regard to color.

**1779.**—*An act for securing the general privileges of the people, and establishing common law and the Constitution as part of the laws of this State.* Recites in the language of the Massachusetts Fundamentals, concluding,—“or in case of the defect of such law in any particular case, by some plain rule warranted by the word of God.”

“That all the people of the American States, within this State, whether they be inhabitants or not, shall enjoy the same justice and law that is general for this State, in all cases proper for the cognizance of the civil authority and courts of judicature in the same, and that without partiality or delay; and that no man's person shall be restrained,” &c., &c.

“That common law, as it is generally practiced and understood in the New-England States, be and is hereby established as the common law of this State.

“That the Constitution of this State, as established by General Convention held at Windsor, July and December, 1777, together with and agreeable to such alterations and additions as shall be made in such Constitution agreeable to the 44th section in the plan of government, shall be forever considered held and maintained, as part of the laws of this State.” Vt. State Papers, 288.

**1786,** Oct. 30.—*An act to prevent the sale and transportation of negroes and mulattoes out of this State.* Laws of 1787,

4to, p. 105. "Whereas by the Constitution of this State, all the subjects of this Commonwealth, of whatever color, are equally entitled to the inestimable blessings of freedom, unless they have forfeited the same by the commission of some crime, and the idea of slavery is expressly and totally exploded from our free government. And, whereas instances have happened of the former owners of negro slaves in this Commonwealth making sale of such persons as slaves, notwithstanding their being liberated by the Constitution, and attempts been made to transport such persons to foreign parts in open violation of the laws of the land," prohibits, under penalty in money for the benefit of the party. This act does not appear in the Digest of 1808. It appears to have been repealed with the revision of the laws at the admission of the State,<sup>1</sup> being supposed to conflict with the fugitive-slave provision. See Tyler, J., in *Selectmen of Windsor v. Jacob*, 2 Tyler's Vt. R. 199.

**1797.**—Nov. 4. *An act adopting the common law of England and declaring that all persons shall be equally entitled to the benefit and privilege of law and justice.* Dig. of 1808, p. 51. Sec. 1. Adopts the common law, so far as applicable, &c. 2. "All the citizens of the United States shall within this State, or Commonwealth, be equally entitled to the privileges of law and justice with the citizens of this State." 3. "That no person's body shall be restrained or imprisoned unless by authority of law." R. S. of 1840, p. 177.

**1828.**—Constitution amended by the declaration,—"No person who is not already a freeman of this State shall be entitled to exercise the privileges of a freeman, unless he be a natural born citizen of this or some one of the United States, or until he shall have been naturalized, agreeably to the acts of Congress."

**1840, c. 8.** *An act to extend the right of trial by jury.* Sec. 1. "Whenever an alleged fugitive from service or labor to which he is held under the laws of other States, shall have escaped into this State, the claim to the services of such alleged

<sup>1</sup> Acts of Congress, Feb. 18, 1791. *An act for the admission of the State of Vermont into this Union*, 1 Stat. U. S. 191. 2 B. & D. 193, and Mar. 2, 1791, an act giving effect to the Laws of the United States within the State of Vermont. 1 Stat. U. S. 197. 2 B. & D. 201.

fugitive, his identity and the fact of his having escaped from another of the United States into this State shall be determined by a jury." 2-4. Proceedings: and that on verdict for the claimant a certificate shall be granted. 5. If the verdict be against the claimant, the alleged fugitive shall not be again arrested on the same claim, and to remove him shall be kidnapping. 6. State's attorney to advise and assist the alleged fugitive. 7. Who shall have subpoenas at public expense. 8. Bond required of the claimant before making the arrest. 9, 10. To remove contrary to this act is made a misdemeanor; under penalty. 11. Declared not to apply to master and apprentice. This act is repealed by the act of 1843.

**1843, c. 15.** *An act for the protection of personal liberty.*

Sec. 1. Courts and magistrates acting under the authority of the State are forbidden to act under sec. 3 of the act of Congress of Feb. 12, 1793. 2. Officers and citizens are prohibited from aiding in seizing, or detaining in any State or county jail, any person claimed as a fugitive slave. 3. Sheriffs, &c., forbidden to assist in the removal of any fugitive slave. 4, 5. Penalty on judge, sheriff, &c., for violation of these provisions, in a fine not exceeding \$1,000, or imprisonment not exceeding five years. Proviso, that this shall not extend to judges, marshals, &c., of the United States. 6. Repeals the act of 1840.<sup>1</sup>

**1850, c. 16.** *An act relating to the writ of habeas corpus, to persons claimed as fugitive slaves, and the right of trial by jury.* Sec. 1 and 7. Enlarging the jurisdiction of the circuit judges. 2. State's attorneys directed to defend fugitive slaves. 3. Issuing of writ regulated. 4. All judicial and executive officers required to give notice to State's attorney of any expected arrest. 5. Appeal to county court from judge in vacation. 6. The court to allow a trial by jury of all facts at issue between the parties on application of either party.

These two statutes are in ch. 101 of Compiled Laws, entitled *Rights of persons claimed as fugitive slaves.*

<sup>1</sup> By R. S. of 1840, p. 177, §§ 72-74; and Compiled St. of 1850, 232, §§ 17-19, any two justices of the peace may issue warrant to apprehend and convey to the State line, to be delivered up, a person against whom criminal process may have been issued in another State. No special power appears to have been given to the Executive.



**1854, c. 52.** *An act for the defence of liberty and for the punishment of kidnapping.* Sec. 1. "Every person who shall falsely and maliciously declare, represent, or pretend that any free person within the State is a slave or owes service or labor to any person or persons with intent to procure, or to aid or assist in procuring, the forcible removal of such free person from this State as a slave," is declared punishable by fine and imprisonment. Claim of apprenticeship for time not included. 2. Declaration of slavery "shall not be deemed proved except by testimony of at least two credible witnesses testifying to facts directly leading to establish the truth of," &c. Declares false representations, &c., punishable by fine and imprisonment. 3. Depositions not to be received on trial. 4. Punishment for resisting the enforcement of this act.

**1858, c. 37.** *An act to secure freedom to all persons within this State.* Sec. 1. "No person within this State shall be considered as property, or subject as such to sale, purchase or delivery; nor shall any person within the limits of this State at any time be deprived of liberty or property without due process of law. 2. Due process of law mentioned in the preceding section of this act shall in all cases be defined to mean the usual process and form in force by the laws of this State, and issued by the courts thereof; and under such process such person shall be entitled to a trial by jury. 3. Whenever any person in this State shall be deprived of liberty, arrested or detained, on the ground that such person owes service or labor to another person not an inhabitant of this State, either party may claim a trial by jury; and in such case challenges shall be allowed to the defendant," agreeably, &c. 4. Every person who shall deprive or, &c., any other person of his or her liberty, contrary to these provisions, declared punishable by fine and imprisonment. 5. African descent no disqualification from citizenship of the State. 6. "Every person, who may have been held as a slave, who shall come or be brought or be in this State, with or without the consent of his or her master or mistress, or who shall come or be brought or be involuntarily, in any way, in this State shall be free." 7. "Every person who shall hold or attempt to hold, in this State, in slavery or as a

slave, any person mentioned as a slave in the sixth section of this act, or any free person, in any form, for any time, however short, under the pretence that such person is or has been a slave, shall, on conviction thereof, be imprisoned in the State prison for a term not less than one year nor more than fifteen years, and be fined not exceeding two thousand dollars."

§ 549. LEGISLATION OF THE STATE OF CONNECTICUT.<sup>1</sup>

1777, Oct. An act discharging owners, emancipating slaves, from liability for their support in certain cases. See Rev. of 1808, p. 625.

1784.—In a revision of the laws, edited at this date, after the colonial charter of Charles II., the Declaration of Independence and the Articles of Confederation, is "*An act containing an abstract and declaration of the rights and privileges of the people of this State, and securing the same.*" In this, after a preamble, which is in the nature of public constitutional law,<sup>2</sup> it is further enacted, "that no man's life shall," &c., &c., as in the Fundamentals; and also, "that all the free inhabitants of this or any other of the United States of America, and foreigners in amity with this State, shall enjoy the same justice and law within this State which is general for the State, in all cases proper for the cognizance of the civil authority and courts of judicature within the same, and that without partiality or delay."

In the same revision, p. 9, under title, *Arrests and imprisonments*, the law respecting the disposing of debtors in service

<sup>1</sup> See vol. I., p. 273.

<sup>2</sup> This preamble is as follows:—"The people of this State, being by the Providence of God free and independent, have the sole and exclusive right of governing themselves as a free, sovereign and independent State; and having from their ancestors derived a free and excellent Constitution of government, whereby the legislature depends on the free and annual election of the people, they have the best security for the preservation of their civil and religious rights and liberties, "and for as much as the free fruition," &c. (as in the colonial Fundamentals, *ante*, I. 258, 268). "But, enacted and declared by the governor, council and representatives in general court assembled and by the authority of the same, that the ancient form of civil government contained in the charter from Charles the Second, king of England, and adopted by the people of this State, shall be and remain the civil Constitution of this State under the sole authority of the people thereof, independent of any king or prince whatever; and that this republic is and shall forever be and remain a free, sovereign and independent State, by the name of the State of Connecticut." Laws, folios 1784-1793, T. Green, New London.



is modified by a provision that the "court shall have power to order and dispose such debtor in service, for the purpose aforesaid, to some inhabitant of this State."<sup>1</sup>

In declaring who shall be freemen, no distinction of persons in respect to color or race is made; see the Revision, p. 88. *An act concerning Indian, mulatto, and negro servants and slaves*, ib. 233, incapacitates servants from contracting, and contains provisions regulating these classes, in the language and to the effect of the colonial laws before cited. It also provides, "And if any free negroes shall travel without such certificate or pass and be stopped, seized, or taken up as aforesaid, they shall pay all charges arising thereby." Also, "And whereas, the increase of slaves in this State is injurious to the poor, and inconvenient," be it, &c., "That no Indian, negro, or mulatto slave shall at any time hereafter be brought or imported into this State by sea or land, from any place or places whatsoever to be disposed of or left or sold within this State. Rev. of 1821, Tit. 93. The act concludes, "And whereas, sound policy requires that the abolition of slavery should be effected as soon as may be consistent with the rights of individuals and the public safety and welfare, Therefore, be it, &c., that no negro or mulatto child that shall, after the first day of March, one thousand seven hundred and eighty-four, be born within this State, shall be held in servitude longer than until they arrive to the age of twenty-five years, notwithstanding the mother or parent of such child was held in servitude at the time of its birth; but such child at the age aforesaid shall be free, any law, usage, or custom to the contrary notwithstanding."

**1788.**—*An act to prevent the slave trade.* Sec. 1. Provides that no "citizen or inhabitant of this State" shall receive on

<sup>1</sup> The same revision, p. 110.—*An act respecting persons who have committed crimes in other States and, to escape from justice, flee into this State.* "That if any person or persons that have been convicted of crime in any other State, for which facts corporal punishment might be inflicted if committed in this State, and (before he or they have received condign punishment) shall escape and flee into this State, or having committed any such crime, and being pursued by the order of authority to bring him or them to justice, such offenders may be apprehended by order of the authority, and if on examination before lawful authority and inquiry into the matter it shall appear that such person or persons have been convicted and have escaped, or are flying from prosecution as aforesaid, he or they may be remanded back and delivered to the authority or officers of the State from which such escape is made, in order," &c.



board his vessel any inhabitants of Africa, "with intent to be imported or transported as slaves or servants for a term of years." 3. Provides that if any person shall kidnap, decoy, or forcibly carry off out of this State any free negro, Indian, or mulatto, or any person entitled to freedom at the age of twenty-five years, inhabitants or residents within this State, or shall be aiding or assisting therein, and be thereof duly convicted," &c., shall pay a fine to the State, and damages to the person injured. 4. Provides "that nothing in this act shall operate to prevent persons removing out of this State, for the purpose of residence, from carrying or transporting with them such negroes or mulattoes as belong to them, or to prevent persons living within this State from directing their servants out of this State, about their ordinary and necessary business. T. Green, ed. of L. p. 368. Suppl. are an act of 1789 and 1792. Hudson & Goodwin's ed. of 1808, p. 628; Rev. of 1821, Tit. 22, § 17.

**1792.**—Suppl. to act of 1784. Permits emancipation of slaves between twenty-five and forty-five years. Hudson & Goodwin's ed. p. 625.

**1797, May.**—Suppl. to act of 1784 enacts "that no negro or mulatto child born within this State, after the first day of August, 1797, shall be held in servitude longer than until he or she arrive at the age of twenty-one years, notwithstanding the mother or parent of such child was held in servitude at the time of its birth; but such child, at the age aforesaid, shall be free, any law, usage, or custom to the contrary notwithstanding." Ib. p. 626; Rev. of 1821, Tit. 93. See *Windsor v. Hartford*, 2 Conn. R. 356; that such child is not *slave* before the age aforesaid.

**1797, October.**—An act to repeal certain paragraphs of the "Act concerning Indian, mulatto, and negro servants and slaves," consisting of police regulations, including that forbidding free negroes to travel without a pass. Hudson & Goodwin's ed. p. 626.<sup>1</sup>

**1810, May, c. 5** repeals the law for the satisfaction of

<sup>1</sup> In the revision of 1808, the above-cited statutes are arranged as chapters of Title CL. *Slaves*. In the same revision, Tit. LXXIX. contains "The act for remanding persons who have committed crimes in other States, and to escape from justice flee into this State," in the same terms as given in revision of 1784.

debts by personal servitude, as given in Tit. 13, c. 1, sec. 2 of the revision of 1808, following revision of 1784.

**1818.**—A new State Constitution.<sup>1</sup> Some provisions declare rights in all persons, others in every *citizen*. Art. 6, sec. 2, limits the elective franchise to "white male citizens of the United States."

**1821, May.** Revision. Title 22. Crimes and punishments. Sec. 17. Against kidnapping, similar in terms to the third section of act of 1788, "*Provided*, that nothing in this section shall operate to prevent persons coming into this State, for the purpose of temporary residence, or passing through the same, from carrying with them their servants, nor to prevent persons moving out of the State, for the purpose of residence, from carrying and transporting with them such servants as belong to them, or to prevent persons living within this State from directing their servants out of the State, about their ordinary and necessary business."<sup>2</sup>

<sup>1</sup> Art. I. "That the great and essential principles of liberty and free government may be recognized and established, we declare," &c. 1. "That all men, when they form a social compact, are equal in rights," &c. 2. "That the people have an indefeasible right to alter their form of government," &c. The language of the Declaration of Independence, "that all men are created equal," &c., is not employed. In the preamble, the people, acknowledging the providence of God in permitting them "to enjoy a free government," "ordain and establish the following Constitution and form of civil government," "in order more effectually to define, secure, and perpetuate the liberties, rights, and privileges which they have derived from their ancestors." That there is nothing in this Bill of Rights making slavery unlawful in Connecticut, see *Jackson v. Bullock*, 12 Conn. 42, 61, 62.

<sup>2</sup> *East Hartford v. Pitkin* (1831), 8 Conn. 402, Williams, J.—"That slavery has existed in this State cannot be denied, and a few solitary cases still exist to attest the melancholy truth." *Jackson v. Bullock* (1837), 12 Conn. 42, Williams, J.—"Slavery exists here to a certain extent. \* \* \* A small remnant still remains," &c.; p. 59, Bissell, J.—"If it here assumed a milder and more mitigated form than in many of the States, this was rather the result of public sentiment and of a more correct state of moral feeling than of any peculiar mildness in our legislative enactments on the subject. But if the system was less rigorous, still it was a system of absolute unconditional servitude. Still the principle was recognized and acted upon that one man might have property in another, might command his services for life without compensation, and dispose of him as he would of any other chattel."

Judge Reeve, in his *Law of Domestic Relations*, 340, 341, said, "The law, as heretofore practiced in this State, respecting slaves, must now be uninteresting. I will, however, lest the slavery which prevailed in this State should be forgotten, mention some things that show that slavery here was very far from being of the absolute, rigid kind. The master had no control over the life of the slave. If he killed him, he was liable to the same punishment as if he killed a freeman. The master was as liable to be sued by the slave in an action for beating and wounding, or for immoderate chastisement, as he would be if he had thus treated an apprentice. A slave was capable of holding property in character of devisee, or legatee. If the

**1821.** A Revision. Tit. 93. *An act to prevent slavery.* Declares the then existing law. See title *Slavery* in the later revisions.

**1833.**—An act which appears in the revision of 1835 in Title 53,—*Inhabitants*, as *An act in addition to An act for the admission and settlement of inhabitants in towns.* (Rev. of 1821, Title 51.) “Whereas attempts have been made to establish literary institutions in this State for the instruction of colored persons belonging to other States and countries, which would tend to the great increase of the colored population of the State, and thereby to the injury of the people,”—therefore enacts, sec. 1, “That no person shall set up or establish in this State any school, academy, or literary institution for the instruction or education of colored persons, who are not inhabitants of this State, nor instruct or teach in any school, academy or other literary institution whatever in this State, or harbor or board for the purpose of attending or being taught or instructed in any such school, academy or other literary institution, any person who is not an inhabitant of any town in this State, without the consent, in writing, first obtained of a majority of the civil authority, and also of the selectmen of the town in which such school, academy or literary institution is situated; and each and every person who shall knowingly do any act forbidden as aforesaid, or shall be aiding or assisting therein, shall for the first offence forfeit and pay to the treasurer of this State a fine of one hundred dollars, and for the second offence shall forfeit and pay a fine of two hundred dollars, and so double for every offence of which he or she shall be convicted. And all informing officers are required to make due presentment of all breaches of this act. Provided that nothing in this act shall extend to any district school established in any school society under the laws of this State or to any incorporated academy or incorporated school for instruction in

master should take away such property, his slave would be entitled to an action against him by his *prochein ami*. From the whole we see that slaves had the same right of life and property as apprentices; and that the difference betwixt them was this: an apprentice is a servant for time, and the slave is a servant for life. Slaves could not contract in court, for this is specially forbidden by statute.” (Rev. of 1784.)

this State.<sup>1</sup> 2. Any colored person not an inhabitant of this State who shall reside in any town therein for the purpose of being instructed as aforesaid, may be removed in the manner prescribed in the sixth and seventh sections of the act to which this is an addition.<sup>2</sup> 3. Any person not an inhabitant of this State, who shall reside in any town therein for the purpose of being instructed as aforesaid, shall be an admissible witness in all prosecutions under the first section of this act, and may be compelled to give testimony therein, notwithstanding any thing in this act, or in the act last aforesaid. 4. That so much of the seventh section of the act to which this is an addition as may provide for the infliction of corporal punishment, be and the same is hereby repealed."

1838, c. 34. Repeals the above, excepting the last section.

—, c. 37. *An act for the fulfillment of the obligations of this State, imposed by the Constitution of the United States, in regard to persons held to service or labor in one State escaping into another, and to secure the right of trial by jury*

<sup>1</sup> Crandall v. The State, 10 Conn. 340. The plaintiff had been indicted under this act: verdict and judgment, in the court below, against her. On hearing the case in the Supreme Court of Errors the information was held to have been insufficient. No opinion was delivered on the question raised on the trial and argued before the court—whether this statute was a violation of the first paragraph of sec. 2 of art. 4 of the Const. of the U. S. On the trial, Daggett, Ch. J., had charged that colored persons, "slaves, free blacks or Indians," are not *citizens* within the meaning of that provision. His reasoning was, before the case of Dred Scott, often cited as the leading authority on that side, and the arguments of counsel are suggestive and offer many authorities. A critical examination of this decision by Wm. Jay, Esq., may be found in his *Inquiry into the character and tendency of the American Colonization and American Anti-Slavery Societies*, pub. 1835, p. 37.

It is very remarkable that no objection seems to have been taken to this act as a violation of the State Constitution. Unless that Constitution recognized a distinction among free persons in respect to its guarantees, how could the legislature discriminate? And are not aliens in Connecticut protected against the action of the legislature by the State Bill of Rights as much as residents?

<sup>2</sup> Sec. 6. "When any inhabitant of any of the United States (this State excepted) shall come to reside in any town in this State, the civil authority, or the major part of them, in such town, are hereby authorized, upon application of the selectmen, if they judge proper, by warrant under their hand, directed to either of the constables of said town, to order said person to be conveyed to the State from whence he or she came," &c. 7. Authorizes the selectmen to warn "any such person, not an inhabitant of this State, to depart," under penalty for remaining. Not applicable to apprentices and servants for time. Rev. of 1838. By R. S. of 1849 and 1854, under Tit. 42, c. 1, settlement in a town is made dependent on the consent of the town authorities, and inhabitants of any State, &c., of the United States, coming to reside, and not having obtained a settlement, may be thus removed. The terms of the act are not limited to paupers.



*in the cases therein mentioned.* Sec. 1. The claimant may have writ of habeas corpus issued for the fugitive from labor, returnable before judges authorized to issue the writ. 2. Preliminary proof required by affidavit. 3. Judge to hear and commit. (Provisions modified by laws of 1839, c. 26.) 4. The facts may be tried by a jury at request of either party. 5, 6. If alleged fugitive be acquitted, he shall recover damages; if verdict for claimant, he shall be delivered, with a certificate. 7. Fees. 8. Forbids issuing the writ by justices of the peace, &c. 9. Penalty for any person removing another as fugitive otherwise than as here provided; and persons so seized may have habeas corpus; provided "that nothing herein shall be construed to extend to any proceedings before any court or magistrate of the United States, or any person acting by the authority of such court or magistrate." Rev. of 1838, p. 571.

1844, c. 27. An act to repeal the above. Sec. 1. Recites, "*Whereas*, it has been decided by the Supreme Court of the United States, since the passing" of this act, "that both the duty and the power of legislation on that subject pertains exclusively to the national government, therefore"—repeals the above. 2. Prohibits judges, justices of the peace, and other officers appointed under the authority of the State, from issuing or serving any process for arrest of person as fugitive from labor, or giving certificate, and that if issued it shall be void; *provided* "that nothing in this act contained shall be construed to impair any right which by the Constitution of the United States may pertain to any person to whom labor or service may be due, by the laws of any other State, from any fugitive escaping into this State, or to prevent the exercise in this State of any powers which may have been conferred by Congress on any judge or other officer of the United States in relation thereto."

This last section is sec. 5 of *An act to prevent slavery*, passed 1848, being Title 51 of Rev. of 1849, of which sec. 1 is, "That no person shall hereafter be held in slavery in this State." 2, 3, 4. Forbid the introduction of any Indian, negro, or mulatto slave," "to be disposed of, left, or sold within the same."

<sup>1</sup> For the construction of this, see *Jackson v. Bullock*, 12 Conn. 38.

1854,<sup>1</sup> c. 65. *An act for the defence of liberty in this State.* Sec. 1. Declares punishment by fine and imprisonment for falsely and maliciously representing a free person to be a slave. 2. The truth of the allegation of slavery must be proved by two credible witnesses testifying to facts. 3. Penalty by fine and imprisonment for maliciously seizing a free person with intent to enslave. 4. Depositions not receivable on such trials. 5. Penalty of fine and imprisonment for false testimony that a person is, or was, a slave or owed service or labor. 6. Penalty for obstructing the apprehension of any person under this act. 7. Representation of debt of service as apprenticeship not herein intended. Compiled St. of 1854, p. 798.<sup>2</sup>

§ 550. LEGISLATION OF THE STATE OF RHODE ISLAND.

1778.—Acts sanctioning and limiting the enlistment of slaves in the continental battalions, are mentioned in Bartlett's Index to Laws of Rh. I. pp. 243, 327, 337. "They were declared free on enlisting, and many actually served with fidelity during the war." E. R. Potter's Report.<sup>3</sup>

1779, Oct. An act preventing slaves being sold out of the State without their consent is mentioned in Bartlett's Index, p. 329, and in Potter's Report.

1784, Feb. An act repealing the clause in the act of June, 1774, respecting the importation of slaves, is also mentioned. Bartlett's Index, p. 332. Mr. Potter mentions a law of this date as *An act authorizing the manumission of negroes, mulattoes, and others, and for the gradual abolition of slavery*, of which the preamble is, "Whereas all men are entitled to life, liberty, and the pursuit of happiness, and the holding of mankind in a state of slavery as private property, which has gradually obtained by unrestrained custom and the permission of

<sup>1</sup> *An act concerning the arrest and surrender of fugitives from justice*, Sess. L. of 1852, c. 51. Sec. 3. Authorizes the governor to arrest and deliver persons claimed. 4. Provides for transportation through this State of offenders taken in some other State and on their way to the State where the offence is charged. Compiled St. of 1854, p. 360.

<sup>2</sup> The clause punishing kidnapping, Compiled St. p. 308, provides "That it shall not operate to prevent persons coming into this State for the purpose of temporary residence, or passing through the same, from carrying their servants with them," &c.

<sup>3</sup> See vol. I. p. 275, n.

the laws, is repugnant to this principle and subversive of the happiness of mankind, the great end of," &c. "It declares all children of slaves born after March 1st, 1784, to be free, and makes regulations for their support. At the same session," says Mr. Potter, "they prohibited the importation or sale of negroes in the State."

**1785**, Oct. An act repealing part of the act for the manumission of slaves, also mentioned in Bartlett's Ind., p. 333; and in Potter's Report.

**1787**, Sep. *An act to prevent the slave trade and to encourage the abolition of slavery*, mentioned, Bart. Ind., p. 333, and Potter's Rep. Mr. Potter says, "This act refers to the fact of the slave trade having been lately carried on from this State, and censures it in strong terms, as contrary to the principles of justice, humanity, and sound policy. It imposes a penalty on every citizen who as master, agent, or owner shall buy, sell, or receive on board his ship for sale any slave," &c.

**1798**.—In a Revision, p. 79, is *An act declaratory of certain rights of the people of this State*. There is no attribution of liberty, &c., to all men as natural and inalienable rights. (Rev. of 1822, p. 66.)

In the same Revision, p. 607, is *An act relative to slaves and to their manumission and support* (given as digested from laws of 1766, 1774, 1779, 1784, 1785, 1798). Sec. 1. No slaves to be brought into the State. *Proviso*, that this "shall not extend to the domestic slaves or servants of citizens of other States or of foreigners traveling through the State or coming to reside therein, nor to servants or slaves escaping from service or servitude in other States or foreign countries and coming of their own accord into this State." 2. Penalty for bringing in slaves. 3. For concealing or assisting to escape. 4. For forcibly carrying off slaves without their consent. 5. Slave in such case emancipated. 6. Proof of slave's consent by certificate of justice. 7. Courts may allow unfaithful slaves to be transported to any part of the United States. Penalty for transporting; proviso, as to persons traveling and escaped slaves. 8. "That no person born within this State, after the first day of March, 1784, shall be deemed or considered a serv-



ant for life or a slave, and that all servitude for life or slavery of children to be born as aforesaid, in consequence of the condition of their mothers, be and the same is hereby taken away, extinguished, and forever abolished." 9. Children of slave mother, if she be held in slavery, to be supported by her owner until twenty-one years. 10. Children of other blacks supported by the towns. 11. Support of emancipated slaves.

**1822.**—In the Revision, p. 441, the above is re-enacted with new sections 12, 13 (*quære*, added in 1804?), providing for appeals in these cases.

**1843, May.** A Constitution of the State adopted. Framed Nov. 1842.

Art. I. A declaration of rights and principles.<sup>1</sup> There is no attribution of liberty, &c., as inalienable and natural rights. Sec. 4. "Slavery shall not be permitted in this State." By Art. II. sec. 1, 2. Every male citizen of the United States, qualified by residence and property, without distinction of color, may hold the elective franchise.

**1844.**—The Revision of this year, p. 342, in the Poor Law, sec. 1. Provides, notwithstanding the constitutional denial of slavery, "that all persons who are holden in servitude or slavery who have not been emancipated according to the provisions of" the act on slaves in the Digest of 1822, shall be supported at the expense of "their owners" if they become chargeable.

**1848.**—*An act further to protect personal liberty.* Pamphl. L. 714. Sec. 1. "That no judge of any court of record of this State and no justice of the peace shall hereafter take cognizance or grant a certificate in cases" arising under the law of Congress of 1793. 2. Forbids sheriffs or other officers of the State to arrest or detain in those cases. 3. Declares justices of the peace, sheriffs, &c., for violating this law, punishable by fine and imprisonment.

<sup>1</sup> There is no declaration that all political power is derived from the people; but by Sec. I. "In the words of the Father of his Country, we declare that the basis of our political systems is the right of the people to make and alter their Constitutions of government; but that the Constitution which at any time exists, till changed by an explicit and authentic act of the whole people, is sacredly obligatory upon all." A Constitution, under which Mr. Dorr claimed to be Governor, was proclaimed Jan. 1842. The controversy at that time, known as Dorr's rebellion, was occasioned by a general demand for an extension of the elective franchise. The question in fact was, Who are *the people* who may "make and alter"? See *Luther v. Borden*, 7 How. 1; VI. Webster's Works, 217.

**1854.**—An amending act. Pamphl. L. 1100. Extends the provisions of this law to the law of Congress of 1850. Rev. St. of 1857, pp. 532–576.<sup>1</sup>

§ 551. LEGISLATION OF THE STATE OF NEW YORK.

**1777.**—First Constitution,\* Sec. 7. Prescribes the qualifications of electors,—every male inhabitant of full age, resident for six months in one of the counties, having certain freehold or other property qualification, or being “a freeman” of the cities of New York or Albany. 8. Electors to take oath of “allegiance to the State.” 41. “That trial by jury, in all cases in which it hath heretofore been used in the colony of N. Y., shall be established and remain inviolate forever.” 42. “That it shall be in the discretion of the legislature to naturalize all such persons as they shall think proper.”

**1781**, c. 32. *An act for raising regiments, &c.* (1 Greenleaf’s Laws, p. 42.) Sec. 6, provides for the manumission of slaves delivered by their owners to serve in such regiments, and a grant of land to the owner.

**1786**, c. 58. *An act relating to confiscated estates.* (1 Greenl. p. 278). Sec. 29, 30, declare the manumission of all negro slaves which may become the property of the State.

**1787**, c. 1. *An act concerning the rights of the citizens of this State*\* (1 Greenl. p. 287), contains thirteen articles. The

<sup>1</sup> R. S. ch. 223. *Of fugitives from justice and protection of officers of adjoining States.* Authorizes arrests by magistrates in view of demand on the executive; but there is no special grant of power to the latter.

\* 1775, May 22,—Assembling of the Provincial Congress; 1776, July 9, the Congress at White Plains ratified the Declaration of Independence, and assumed the style of the Convention of the People of the State of New York. 1777, April 20, State Cons. adopted; see *Journals, &c.*; recites resolve of the Congress of the colony. May 31, 1776—“Whereas the present government of this colony, by Congress and committees, was instituted while the former government under the crown of G. B. existed in full force,” &c.—that its object was temporary—its inconveniences—recites the recommendation of the General (Continental Congress, of May 10 and 15, 1776, to these colonies to adopt a form of government; the election of deputies to form a Constitution for the State, &c.—recites the Declaration of Independence, and its ratification by the State—that “By virtue of which several acts, declarations and proceedings mentioned and contained in the aforecited resolves, or resolutions of the General Congress of the United American States, and of the congresses or conventions of this State, all power whatever therein hath reverted to the people thereof,” &c., &c.

<sup>2</sup> See Reviser’s Reports and Notes, &c., in vol. 3 R. S. on Part I. c. 4, of R. S. entitled, *Of the rights of the citizens and inhabitants of this State, and post, laws of this State*, an. 1830.

2d—"That no citizen of this State shall be taken or imprisoned, or be disseized of his or her freehold or liberties, or free customs, or out-lawed, or exiled, or condemned, or otherwise destroyed, but by lawful judgment of his or her peers, or by due process of law." The 5th—"That no person, of what estate or condition soever, shall be taken or imprisoned, or disinherited or put to death, without being brought to answer by due process of law; and that no person shall be put out of his or her franchise, or freehold, or lose his or her life or limb, or goods and chattels, unless, he or she be duly brought to answer and be fore-judged of the same, by due course of law; and if anything be done contrary to the same, it shall be void in law, and holden for none." The 6th provides, "That writs and process shall be granted to all persons requiring the same." In the other articles the term "citizen" is used alone, except the last, where "citizens and inhabitants" is the expression.

**1788, c. 13.** *An act concerning apprentices and servants.* (In 2 Greenleaf, p. 26, but not in Webster's ed. of 1802.) Sec. 8. Continues indentures of persons coming from beyond sea. —, c. 40. *An act concerning slaves.* (2 Greenleaf, p. 85.) Sec. 1. Enacts that "every negro, mulatto, or mestee within this State who, at the time of the passing of this act, is a slave for his or her life, shall continue such for and during his or her life, unless he or she shall be manumitted or set free in the manner prescribed in and by this act, or in and by some future law of this State." 2. Enacts that "the children of every negro, mulatto, or mestee woman, being a slave, shall follow the state and condition of the mother, and be esteemed, reputed, taken and adjudged slaves to all intents and purposes whatsoever." 3. That "the baptizing of any negro or other slave shall not be deemed, adjudged, or taken to be a manumission of such slave." 4. That any person selling a slave brought into this State after the first day of June, 1785, shall forfeit 100*l.*; "and further, that every person so imported or brought into this State, and sold, contrary to the true intent and meaning of this act, shall be free." 5. That any person buying or receiving a slave with intent to remove such slave out of this State, to be sold, shall forfeit 100*l.*, and such slave

shall be free.<sup>1</sup> 15, 16. Relate to the manumission of slaves. The other sections contain re-enactments of police regulations.

**1790**, c. 28. (2 Greenl. 312.) Amending the above act, by two sections respecting transportation of criminal slaves and manumission cases.

**1798**, c. 27. This confirms former manumissions made by Quakers and others, not in conformity with statute law.

**1799**, c. 62. *An act for the gradual abolition of slavery.* Provides "that any child born of a slave within this State after the fourth day of July next, shall be deemed and adjudged to be born free. Provided, nevertheless, that such child shall be the servant of the legal proprietor of his or her mother until such servant, if a male, shall arrive at the age of twenty-eight years; and if a female, at the age of twenty-five years; that such proprietor, &c., shall be entitled to the service of such child until he or she shall arrive to the age aforesaid, in the same manner as if such child had been bound to service by the overseers of the poor." Remainder, prescribing certain duties on the part of the masters, allows them to abandon their right to such service, and permits emancipation of all slaves by their owners.

**1801**, c. 188. *An act concerning slaves and servants.* Sec. 1. Enacts that slaves shall continue such: baptism no manumission. 2. Permitting manumission; fixing liability of master. 3. Quaker manumissions. 4. That no slave shall hereafter be imported or brought into this State, unless the person importing or bringing such slave shall intend to reside, shall have resided elsewhere, and have, for a year before, owned such. Every slave otherwise brought in shall be free. 5. Penalty on persons selling slaves brought into State. 6. Penalty for attempting to export a slave. 7. Non-residents may travel in the State with slaves. Citizens may take away slaves on journeys; must return with them. Persons removing may take away slaves, &c. 8, 9, 10. Re-enacts the law of 1799 in terms somewhat different. 11-20. Various ordinary police regulations.

<sup>1</sup> See on the interpretation of this provision *Sable v. Hitchcock*, 2 Johns. Cases, 79. See Kent, J., ib. p. 85, holding that slaves in New York were then property; and in *Fish v. Fisher*, ib. 89.



**1802**, c. 52, and 1804, c. 40. Amending the above act in respect to maintenance of pauper children of slaves, and the abandonment of children of slaves. 1807, c. 77. Amending the same; limiting still farther the power of residents to carry away slaves.

**1808**, c. 96. *An act to prevent the kidnapping of free people of color*, has no reference to fugitive slaves.

**1809**, c. 44. *An act to enable, &c.* Enables manumitted slaves to take "by descent, devise, or otherwise;" that all marriages contracted where a party or parties "was, were, or may be slaves," shall be valid, and the children legitimate. Sec. 3 facilitates manumission.<sup>1</sup>

**1810**, c. 115. Additional to act of 1801. Sec. 1. Forbids importation of slaves by persons coming to reside—nine months' stay to be accounted as residence. 2. Reciting an evasion, provides that no indenture for service made by a person before held as a slave in another State shall be valid here. 3. Requires masters of slaves to be freed at twenty-one years to teach them to read. —, c. 193. An act for various purposes. Sec. 23. Authorizes emigrants, from Virginia and Maryland into counties named, to hire out their slaves for seven years or less.

**1811**, c. 201. *An act to prevent frauds, &c., and slaves from voting.* Sec. 3-7. Requiring production of certificates of freedom from blacks or mulattoes offering to vote.

**1813**, c. 203. An act for various purposes. Sec. 29. Amends the act of 1801, § 4, in respect to slaves belonging to persons resident near the State boundary, and owning and occupying lands in the adjoining State.

In the revision of the statutes known as Revised Laws of 1813, 2d vol. pp. 201-209, 247, the former statutes on this subject are re-enacted.

**1814**, c. 18. *An act to authorize the raising of two regiments of men of color.* Sec. 3. All the commissioned officers to be white men. 6. Slaves may, with the consent of owners, be enlisted, and when discharged shall be deemed manumitted.

<sup>1</sup> Jackson v. Lurvey, 5 Cowen, 397, where the operation of this statute is examined.

ted, &c. —, c. 82, and 1815, c. 145, contain new provisions for certificates of freedom, &c., required of free blacks for election purposes.

**1816**, c. 45. *An act concerning the maintenance of certain persons formerly slaves.*

**1817**, c. 137. *An act relative to slaves and servants*, for the most part, is a more systematic arrangement of the existing law. The last section repeals the laws in the revision of 1813, above referred to. Sec. 9. Declares free any person imported who has been held as a slave. Exceptions in sec. 15 as to slaves of travelers. 16. Slaves held by persons coming to reside. 29. Re-enacts the law (1808) against kidnapping colored persons, and reciting, "Whereas persons of color, owing service or labor in other States sometimes secrete themselves on board of vessels while such vessels are lying in the ports or harbors of other States, and thereby subject the commanders thereof to heavy fines and penalties, therefore, 30. That it shall be lawful for all such captains, &c., to seize such person of color, and take him before any magistrate of a county, or, if in the city of New York, before the justices of the police office, and upon proof by oath or affirmation, to the satisfaction of the said magistrate or justice, that such person of color did, without his consent or knowledge, secrete himself on board his vessel, such magistrate or justice shall give a certificate thereof to such captain, &c., which shall be a sufficient warrant to send or carry such person of color to the port or place from which such person was so brought. *Provided*, that nothing in this section contained shall prevent such person of color, when brought before such magistrate or justice, from proving that he does not owe service or labor in another State."

Sec. 32. Enacts that every negro, mulatto, or mustee within this State, born before the fourth of July, one thousand seven hundred and ninety-nine, shall from and after the fourth day of July, one thousand eight hundred and twenty-seven, be free."<sup>1</sup>

<sup>1</sup> In the case of *Griffin v. Potter*, 14 Wendell, 209, it had been insisted that this clause "was unconstitutional so far forth as it assumed to forfeit then-existing rights." In affirming the validity of the act, Savage, Ch. J., uses language which is interesting in connection with the question discussed in the last chapter (vol. I. p. 562), though also illustrating the confusion of ideas which has prevailed on this



**1819**, c. 141. An act to amend the above, substitutes more stringent provisions for the sections relating to exporting slaves or servants, and the kidnapping of free persons. Sec. 4. Permits owners who reside part of the year in this State, to carry away and bring back slaves.

**1823**,<sup>1</sup> Jan. 1. Second Constitution. Art. II. sec. 1, prescribes qualification of electors, concluding, but no man of color, unless he shall have been for three years a citizen of this State and, for one year next preceding any election, shall be seized and possessed of a freehold estate to the value, &c., &c. (such estate not being required of whites). Art. VII. sec. 1, provides that "No member of this State shall be disfranchised or deprived of any of the rights or privileges secured to any citizen thereof, unless by the law of the land, or the judgment of his peers."

**1824**, c. 177. Relating to government of the Stockbridge Indians. Sec. 2. That no negro or mulatto shall vote in their councils.

**1826**, Nov. An amendment to the Constitution, extending the elective franchise, reserves the previous clause relating

subject. "It is contended that the statute, assuming to divest a vested right, is unauthorized and void *pro tanto*. It is a fundamental principle of our government that all men are born free and equal—that is, entitled by nature to equal freedom and equal rights. The regulations of civil society have qualified the rights of different portions of society. The best interests of the whole sometimes require that some shall be put under the guardianship and control of others. It is, therefore, by virtue of the arbitrary institutions of society, and by those alone, that one man has an interest in the services of another: property, strictly speaking, in the person of a human being cannot exist. A right in one man to the services of another, may, and, in a qualified form, does exist in every well-regulated society. The parent controls the services of his child, the guardian his ward, the master his apprentice. By what right? it may be asked. I answer, by authority of law—by force of the positive institutions of civil society. Is it not equally competent for the Legislature to say that an apprentice shall serve till twenty-eight as till twenty-one? Cannot the Legislature alter the paternal rights of a father, and give him the services of his child for the same period? The power of the Legislature over this subject is sufficiently ample to justify any act which can come in question in this case. When our government was first instituted, one portion of the population was in bondage to the other. Slavery existed by virtue of the laws which were in force previous to our political existence as a State. It could be justified only by necessity. It was at war with our principles, and, as the Legislature was of the opinion that there was no necessity for its continuance, a law was passed to operate upon those thereafter to be born. This, I apprehend, was done in tenderness to the prejudices of those who were tenacious of what they termed vested rights."

<sup>1</sup> Adopted by the Convention, Nov. 10, 1821.



to men of color, but otherwise extending the franchise to every adult male citizen, irrespective of property, taxes, &c.

**1827**, c. 312. An act against kidnapping persons other than negroes, mulattoes, or mustees.

**1828**.—Revised Statutes, Part III., ch. 9, Tit. 1, Art. 1. Relating to habeas corpus. Sec. 6. Authorizes the issuing the writ, by courts and officers, described in sec. 23, art. 2, of the same title,<sup>1</sup> in behalf of the claimant of a fugitive from service, &c. 7. Proof entitling to the writ to be by affidavit. 8, 9, 10. Proceedings on hearing. On failure to prove claim, the claimant to forfeit one hundred dollars to the alleged fugitive, and be liable for damages. 11. On the claim being made out, the court or officer to grant a certificate. 12. "Such certificate shall authorize the person having the same to remove such fugitive therein named, without any unnecessary delay, through and out of this State, on the direct route to the place of the residence of the claimant of such fugitive." 13. Fees, when to be paid. 14. "No justice of the peace, magistrate, or other officer appointed under the authority of this State, other than the courts and officers herein authorized to issue writs of habeas corpus, shall be authorized to grant any warrant," &c., or grant certificate. Penalty to the party aggrieved. 15, 16, 17. Notwithstanding the detention under the *habeas corpus*, the alleged fugitive may have his writ *de homine replegiando*, and Until final judgment on the latter writ, the proceedings under the *habeas corpus* to be suspended.<sup>2</sup> 18, 19. Prohibition and penalty against taking or removing fugitive otherwise than as here provided. —, Part I. ch. 20, Tit. 7. *Of the importation into this State of persons held in slavery; of their exportation; of their services; and prohibiting their sale.* Sec. 1. Per-

<sup>1</sup> These are: 1. The supreme court during its sitting. 2. During any term or vacation of the supreme court, the chancellor, or any one of the justices of the supreme court, or any officer who may be authorized to perform the duties of a justice of the supreme court at chambers, being or residing within the county, or, in certain cases, an officer of such authority in any adjoining county. In the case of *Jack v. Martin*, in 12 Wendell, 311, which occurred in 1833, habeas corpus was issued by the Recorder of the city of New York, under the Rev. Statutes; see the case *post* in Ch. XXIX.

<sup>2</sup> Suspended, but not vacated;—*Ex parte Floyd v. The Recorder*, 11 Wendell, 180.

sons held as slaves not to be brought into this State. 2. Last section not to discharge fugitives from other States. 3. Emigrants from other States may bring their slaves with them, if born after July 4th, 1796, and before July 4th, 1827. 4. Such slaves brought in since March 31, 1817, shall be free, but remain servants, males until twenty-eight, females until twenty-five years of age. 5. Such persons brought after passage of this law to serve only until the age of twenty-one. 6. Permits non-residents traveling in the State to bring with them their slaves. 7. Privilege of persons resident part of the year. (Sec. 3-7 are repealed by 1841.) 8, 9. Against selling any person as a slave. 10. Forbidding transfer of service of certain persons. 11. Certain contracts for service void. 12, 13. Against sending slaves or servants out of the State. 14. Inhabitants journeying may take servants, on certain conditions. 15. Persons of color owing service or labor in other States secreting themselves in vessels may be returned.<sup>1</sup> (These provisions are mostly re-enactments. See laws of 1801, 1810, 1817, 1819.) 16. "Every person born within this State, whether white or colored, is free; every person who shall hereafter be born within this State shall be free; and every person brought into this State as a slave, except as authorized by this title, shall be free."

Part. IV. c. 1, Tit. 2, art. 2, sec. 28-32. Declaring punishment of kidnapping, includes kidnapping to sell as a slave, or in any way to hold to service against the will.

**1834**, c. 88. Amending the above. Persons claimed as fugitives are to be supported by claimants, and the latter may be held to bail. R. S., Part III., ch. 9, t. 1, art. 1, §§ 12, 13.<sup>2</sup>

<sup>1</sup> This provision held to be in violation of the Constitution of the United States, in *Kirk's case*, 1 *Parker's Crim. R.* 67, on the ground that Congress had legislated on the subject of fugitive slaves, and on the doctrine of *Prigg's case*.

<sup>2</sup> The act passed 1822, c. 148, *An act to provide for delivering up fugitives from justice*, was repealed 1828, and its provisions re-enacted in R. S. Part I., ch. 8, Tit. 1, sec. 8-11, which authorize the governor to deliver any person charged with murder, &c., or crime, treason excepted, committed without the jurisdiction of the United States, which in New York would be punishable with death or imprisonment; but the governor shall require such evidence "as would be necessary to justify his apprehension and commitment for trial had the crime charged been committed within this State." An act of 1839, c. 350 (R. S., Part IV., ch. 2, t. 2, §§ 40-47), authorizes the commitment by magistrates of persons charged with commission of crimes in other States; the governor is there referred to as already empowered. As to the practice, see *Hayward's case*, 1 *Sandford*, 701.

1840, c. 225. *An act to extend the right of trial by jury.*

Sec. 1. "Instead of the hearing provided by" the Revised Statutes last cited, on habeas corpus, "the claim to the service of such alleged fugitive, his identity, and the fact of his having escaped from another State of the United States into this State shall be determined by a jury." 7. If the finding of the jury be in favor of the claimant upon all the matters submitted, the court or officer before whom, &c., shall grant a certificate to take such fugitive and convey him to the State from which he fled; which certificate shall authorize, &c., as by sec. 12 of the law in the R. S. 8. If the finding of the jury be against the claimant on any of the matters submitted to them, "the person so claimed as a fugitive shall be forthwith set at liberty and shall never thereafter be molested upon the same claim; and any person who shall thereafter arrest, detain, or proceed in any manner to retake such alleged fugitive upon the same claim, or shall by virtue of the same claim remove such alleged fugitive out of this State under any process or proceeding whatever, shall be deemed guilty of kidnapping, and, upon conviction, shall be punished by imprisonment in the State prison not exceeding ten years." 9. The district attorney shall render his services to such alleged fugitive, or counsel shall be appointed by the court. 10, 11. Incidental provisions. 12. Requires a bond to be given by a claimant suing out habeas corpus for an alleged fugitive. 13. Repeals sections 15, 16, 17 of the title of the R. S. before given under the year 1828. 14. Who to preside at jury trial. 15. Commission to take testimony may issue. 16. "No judge or other officer of this State shall grant or issue any certificate or other process for the removal from this State of any fugitive, &c., otherwise than in pursuance of the provi-

<sup>1</sup> In a note to this section in the 4th ed. of R. S., vol. I., p. 793, the editors cite *Prigg's case* as establishing that all State laws calculated to interfere with Art. 4, sec. 2, ¶ 3, of the Const. of the United States, are unconstitutional, adding:—Since that decision the Fugitive Slave Law of 1850 has been passed by Congress, "containing provisions repugnant to the whole of this act. It is therefore of no force; but as it never has been repealed, it is here inserted." It would be curious, indeed, should private persons undertake to decide on the possession of a power in dispute between those in one of whom it must be a power of sovereignty, and expunge from its code a rule which the State claimed to be within the scope of its "reserved" powers.



sions of this act;" penalty in such case. 17. Punishment for removing fugitives.<sup>1</sup> 18. The act is not to "apply to the relation of master and apprentice which may exist in any other State."

—, c. 375. *An act more effectually to protect the free citizens of this State from being kidnapped or reduced to slavery.* The governor is required "to take such measures as he shall deem necessary to procure" that any person kidnapped, &c., be restored to his liberty, and returned; is to employ agents. Their duty to take legal proceedings, &c.

<sup>1</sup> In the trial of Allen, United States Deputy Marshal, at Syracuse, June 21, 1853, Judge Marvin charged, Pamphlet Report, p. 87: "The indictment is founded on the 17th sec. of the act relating to fugitives from service or labor, passed in 1840. In that section it is declared that 'every person who shall, without the authority of law, forcibly remove or attempt to remove from this State any fugitive from service or labor or any person who is claimed as such fugitive, shall forfeit, &c., and shall be deemed guilty of kidnapping.' He has interposed a special plea justifying his acts under the law of the United States, passed in 1850, known as the Fugitive Slave Act. He has set forth the proceedings by the Commissioner, the warrant issued by the Commissioner, and the arrest under the warrant. \* \* On the part of the defence, the validity of the State law under which the indictment is framed is questioned. It is insisted that it is in conflict with the Constitution and laws of the United States." Judge Marvin charged that the law of Congress was constitutional, and that the prisoner was not guilty of violating the State law, which he held was likewise in harmony with the Constitution of the United States. On page 97, "Now as to the State law under which the defendant is indicted, I think the particular section upon which this indictment is founded is clearly constitutional. The act relates generally to proceedings before State magistrates and officers, when fugitives from service or labor are claimed. The act of Congress of 1793, confided the execution of the law to State magistrates as well as United States. Now as the State, by statute, has power to regulate and control the action of its own officers and agents (when this power is not limited by the State Constitution), it may entirely prohibit the State judge or court from using the judicial powers derived from the State, in execution of the law of Congress, and that leaves the execution of the law to the judicial power of the United States. It may also regulate the exercise of the *State judicial power*, when employed in executing the United States laws, being, however, careful not to provide or require anything conflicting with any of the provisions of the United States law. That, if the State court takes jurisdiction of the case, must be strictly followed.

"The section of the statute under which this indictment is found, provides that 'every person who shall, *without authority of law*, forcibly remove or attempt to remove from this State any fugitive from service or labor, or any person claimed as such fugitive, shall forfeit, &c., and shall be deemed guilty of the crime of kidnapping,' &c. This provision is not only constitutional, in my judgment, but is extremely proper, whatever may be said of other provisions of the act, upon which I am not called to express an opinion, and which I have not examined with sufficient care. This section makes it a criminal offence to attempt the forcible removal without authority of law. This is certainly constitutional and a very proper provision. It does not affect those who act *under authority of law*. This will include the Constitution and laws of the United States, as they are the supreme law of the land. The State should protect all its people, and every person in it, from *unlawful* seizure and removal."

**1841**, c. 247. *An act to amend the Revised Statutes in relation to persons held in slavery.* Repeals sections 3, 4, 5, 6, 7, of Title 7, ch. 20 of the 1st Part of the Revised Statutes.<sup>1</sup>

**1846**.—A new Constitution. Art. I, sec. 1; Art. II, sec. 1, like the provisions of the court of 1822, already cited.<sup>2</sup>

§ 552. LEGISLATION OF THE STATE OF NEW JERSEY.

**1776**.—In the first Constitution of the State, dated July 2,<sup>3</sup> there are no formulated provisions in the nature of a Bill of Rights, nor any attribution of natural rights to all persons. The elective franchise is not limited to whites.

**1781**, c. 15. An act respecting enlistments, &c. In sec. 9 the enlistment of slaves, among others, is prohibited. Wilson's compilation, p. 205.

**1786**.—Mar. 2. An act to prevent the importation of slaves, and for the manumission of slaves, under certain restrictions, and to prevent abuse. 1788, Nov. 24, an act supplemental to the last. See law of 1798.

<sup>1</sup> Laws of New York 1842, p. 419.—Concurrent Resolution, April 11, 1842: "Whereas the Governor of this State has refused to deliver up, upon the demand of the executive authority of Virginia, alleged fugitives from justice, charged with the crime of theft, viz.: Stealing a slave within the jurisdiction and against the laws of Virginia. And whereas the Governor has assigned as the reason for such refusal, that the stealing of a slave within the jurisdiction and against the laws of Virginia, is not a felony, or other crime within the meaning of the second section of the fourth article of the Constitution of the United States. *Resolved*, That in the opinion of this legislature, stealing a slave within the jurisdiction and against the laws of Virginia, is a crime within the meaning of the second section of the fourth article of the Constitution of the United States."

<sup>2</sup> Laws of 1857, 2d vol. p. 797.—Concurrent Resolution, Ap. 16: "That this State will not allow slavery within her borders, in any form, or under any pretence, or for any time however short. That the Supreme Court of the United States, by reason of a majority of the judges thereof having identified it with a sectional and aggressive party, has impaired the confidence and respect of the people of this State."

<sup>3</sup> See Vol. I, p. 286. This recited that "all the constitutional authority ever possessed by the kings of Great Britain over these colonies was by compact, derived from the people," that all civil authority under the present king is necessarily at an end; recites the recommendation of Congress to the colonies to form governments (May 15, 1778), that "We, the representatives of the Colony of New Jersey, having been elected by all the counties in the freest manner, and in Congress assembled, have, after mature deliberation, agreed upon a set of Charter Rights, and the form of a Constitution in manner following, viz.: Art. 1. 'That the government of this Province shall be vested in a Governor, Legislative Council, and General Assembly.' The final clause declares that this Charter shall be null and void, if a reconciliation between Great Britain and these colonies shall take place," &c.



**1796-7.**—A law to prevent the importation of convicts, also repeals the colonial law of 1730.

**1796.**—*An act for the punishment of crimes.* Patterson's Laws, p. 208. Sec. 69, empowers courts, on conviction of any slave for offences not punishable with death, to impose corporal punishment not extending to life or limb, instead of the punishment provided in other cases. Rev. L. of 1821, p. 262. Crimes act, 1829, § 69.

**1798.**<sup>2</sup>—*An act respecting apprentices and servants.* Patterson's L. 305. Rev. L. of 1821, 366.

—, March 14. *An act respecting slaves.* Patterson's Laws, p. 307. Rev. L. 369. Sec. 1. That every negro, Indian,<sup>1</sup> mulatto or mustee, within this State, who at the time of passing this act is a slave for his or her life, shall continue such during his or her life, unless he or she shall be manumitted or set free in the manner prescribed by law.<sup>2</sup> 2. Slaves not to be witnesses, except against each other. 3, 4, 5. Against trading with, or harboring slaves. 6. Arrest of negroes without passes. 7. Slaves belonging to inhabitants of the other States, coming without license of their owners, may be taken up by any person in this State and be carried before the next justice of the peace, who is hereby authorized and required to commit such slave to the county jail, there to remain until the charges are paid.<sup>3</sup> 8, 9. Against disorderly acts of slaves. 10, 11. Against allowing them to beg; selling them to such as cannot maintain them. 12. Penalty for bringing slaves into the State. *Proviso.* That nothing in this act contained shall be construed to prevent any person who shall remove into this

<sup>1</sup> State v. Waggoner (1797), 1 Halstead, 375, that Indians may, as well as negroes, be slaves in N. J., but this is by statute.

<sup>2</sup> There is a volume of reports of this State entitled, Joseph Bloomfield's Cases, relative to manumission of negroes, A. D. 1775-1793.

<sup>3</sup> Gibbons v. Morse (1821), 2 Halstead, 254, under this act. Against master of ferry-boat for removing slave. Held, that in New Jersey all black men are presumed to be slaves until the contrary appears, followed in Fox v. Lambson (1826), 3 Halstead, 275. But in Stoutenborough v. Haviland (1836), 3 Green, 266, held, that this "presumption ought no longer to be admitted, both from the notorious fact that the generality of persons in this State are not in truth held as slaves now, as well as from the natural consequence which must be supposed to follow our statute for the gradual abolition of slavery."



State, to take a settled residence here, from bringing all his or her slaves, or any foreigners or others having only a temporary residence in this State for the purpose of transacting any particular business or on their travels, from bringing and employing such slaves as servants, during the time of his or her stay here, provided such slave shall not be sold or disposed of in this State. 13. Citizens of the State owning slaves in other States, may bring them on filing certificates. 15. Persons may be indicted for cruel treatment of their slaves; punishment to be by fine, not exceeding forty dollars. 16. Owners required to teach negro slaves or servants, for life or for years, to read; under penalty. 17, 18, 19. Respecting seizure of vessels fitting for the slave trade. 20. Conditions on the removal of slaves from the State. *Proviso.* That the rule does not apply to persons removing to some other of the United States. (Rep. 1820.) 21-26. Regulating the manumission of slaves. 27. Free negroes from other States not to travel, or reside, or be employed, or harbored in this State without a certificate. 28. Free negroes of this State not to go out of their proper county without a certificate. 29. Provides for a trial by jury "when any habeas corpus shall be brought to remove any negro, mulatto, mestee, or Indian before the Supreme Court out of the possession of the persons claiming the service of such for life, years, or other term." 30. Repeals a number of acts, relating to slaves, of 1713, 1751, 1768, 1769, 1786, and 1788, leaving this, apparently, to be the only statute on the subject.

**1799.**—An act respecting workhouses; Patterson's L. p. 378. Sec. 5, 6. That any stubborn, disobedient, rude or intemperate slave may be committed to the workhouse by a justice, on the complaint of the owner, and payment of expenses.

**1804.**—*An act for the gradual abolition of slavery.* Sess. L. p. 251. Sec. 1. That every child born of a slave, after the fourth of July, 1804, "shall be free," but "remain servants;" males until twenty-five, females until twenty-one years. Contains other provisions relating to maintenance. Amended by

<sup>1</sup> See Vol. I. pp. 284, 285.

1806, Sess. L. p. 668. Suppl. 1808, Sess. L. p. 112; 1809, Sess. L. p. 200; 1811, Sess. L. p. 313. Re-enacted, 1820.

**1812.**—Supplem. to act concerning slaves. Sess. L. p. 15. Repeals sec. 20; forbids the removal of slaves out of the State, but with their own assent or assent of parents, to be certified; provides for penalties and security.

**1818-19.**—*An act to prohibit the exportation of slaves or servants of color out of this State.* Sess. L. p. 3, Provides penalties, and slaves, &c., to be free. Excepts residents journeying and non-resident travelers. Repeals law of 1812. Suppl. ib. p. 31. Persons are also permitted to bring slaves for temporary residence.

**1820.**—*An act for the gradual abolition of slavery and other purposes respecting slaves.* R. L. of 1821, p. 679. Consists of a modification of the existing enactments. Sec. 17. Allows the removal of slaves by owners in certain cases.

—, Supplement to census act, ib. 793, allows slave convicted of crimes to be sent out of the United States. A poor law. Sec. 6, 7, 8, ibid. 765, relates to settlement of children of statu-liberi, born after 1804. An act on elections, sec. 4, ib. 741, limits the elective franchise to "free, white, male citizens of this State."

**1826.**—Supplementary to act concerning slaves, of 1798. Sess. L. p. 90; Harrison's Compil. 146. Repeals sec. 7, on the commitment of runaway slaves from other States. Authorizes any judge of "any inferior court of common pleas or justice of the peace," on oath of claimant, to issue warrant for arrest, and, "upon proof to the satisfaction of the judge," to deliver to claimant, with certificate.<sup>1</sup> Sec. 7. Requires a

<sup>1</sup> The case in New Jersey Superior Court, Feb. 1836—*The State v. The Sheriff of Burlington*—was on habeas corpus for the colored man Nathan, *al. dict.* Alex. Helmsley. Hornblower, Ch. J., had allowed the writ returnable at chambers, and then remanded the prisoner, with instructions to the sheriff to have him, with the cause, &c., at the bar of the court. By the return it appeared that prisoner had been arrested on warrant issued by Judge Haywood, of the county of Burlington, and committed to the common jail of said county, at the instance of one who claimed him as runaway slave of an owner in Maryland. The case was argued by Mr. W. Halstead and Mr. Frelinghuysen for the prisoner, and by Mr. Clark and Mr. Brown for the claimant. The judges delivered opinions *seriatim*, all concurring in discharging the prisoner out of the custody of the sheriff; there was, however, much disagreement among them as to the proper extent of the discussion, for which reason, I believe, the case was not given in



judge, &c., issuing certificate according to the law of Congress of 1793, to make record. 8. Declares penalty for seizing a per-

the State Reports. Ch. J. Hornblower considered fully the several questions raised, in his Opinion, which has appeared in several newspapers, and I have his authority for saying that the report in the New York Evening Post, July 30, 1851, from which the extracts given in this volume are taken, is sufficiently authentic. The portion bearing on the construction of the 4th Art. of the Constitution of the United States will be cited hereinafter. See *post*, ch. XXVI. After which Judge Hornblower, holding that "the proceeding in question had not been in conformity with the provisions of the act of Congress in respect to fugitive slaves, but in pursuance of the law of the State," considered that law in view of the State Constitution, as follows:

"The counsel for the prisoner have insisted upon his enlargement, on the ground that his arrest and commitment were irregular, and unauthorized by the statute. But a preliminary, and, to my mind, a very grave and important, question arises. Admitting the right of State legislation on this subject (which I am not disposed to deny), is the law of this State a constitutional one? It authorizes the seizure and transfer out of this State of persons residing here under the protection of our laws, claiming to be, and who in fact may be, free-born native inhabitants, the owners of property, and the fathers of families, upon a summary hearing before a single judge, without the intervention of a jury, and without appeal! Can such be a constitutional law? Neither the prisoner nor the most obscure individual in the State, whether young or old, bond or free, can be deprived of his liberty or property, or be subject to any forfeitures, pains, or penalties, without a trial by jury in the due course of law. If the prisoner at the bar, instead of being arrested as a slave, had been sued for forty shillings, it could not have been recovered of him but by a verdict of a jury. If a man had come from any other State, and laid claim to any chattel in the possession of the prisoner, he could not have taken it from him but by due course of law. And yet, by this act, a man may be compelled to join issue before a single judge—a judge of his adversary's own choosing, and in a summary way, not according to the course of common law—an issue, it may be, more awful, more agonizing to his soul, than one involving his *life and death*—an issue on the decision of which hangs that tremendous question whether he is to be separated forcibly and forever from his wife and children, or be permitted to enjoy with them the liberty he inherited and the property he has earned; whether he is to be dragged in chains to a distant land, and doomed to perpetual slavery, or continue to breathe air and enjoy the blessings of freedom—an issue not only involving the question whether he ever was a slave, or, if once a slave, whether he was liberated or actually fled from his master; but, it may be, involving the identity of his person. He may be falsely accused of escaping from his master, or he may be claimed by mistake for one who has actually fled. These are questions of fact, upon proof or failure of proof of which depend results of deep and affecting interest to the individual. If every colored man, woman, and child were slaves, the danger of oppression and injustice by an unfounded or mistaken claim would be of little consequence. But such is not the fact. On the 4th next, there will not be a slave in the State under the age of thirty-two years. All that have been born since the Fourth of July, 1804, are *free-men*; and by the laws and Constitution of this State every question affecting their rights to property, or of personal liberty and security, is to be *tried* and settled in the same solemn manner, and by the same tribunals, by which the rights of others are to be determined. By the 23d art. of our Constitution, the trial by jury is guaranteed and preserved to us. Who then shall take it away from any human being living under the protection of our laws? But, it is said, the Constitution of the United States is paramount to that of our State, and by the former we are bound to deliver up persons escaping from labor or service. Granted; and let it be executed fully, fairly, and with judicial firmness and integrity. But what does it require? That

son without warrant or "other legal authority for the purpose under some act of the Legislature of this State, or of the Congress of the United States."

1837.—Suppl. to above. Sess. L. 134, providing for a trial by jury on demand of either party. A full re-enactment in 1846. R. S. 567, Elmer's Dig. 764. The act on crimes, § 62, R. S.

the person claimed shall be given up? If it did so, I admit there can be no trial, no appeal; the *claim* would be final and conclusive. But such is not the language or the meaning of the Constitution. In respect to refugees from justice the case is very different. The Constitution declares that persons *charged* with crime in any State, shall, on demand of the executive authority of that State, be delivered up (Clark's case, 9 Wend. p. 212). Here is to be an official act; the demand is made by the public authorities, founded simply upon a *charge of crime*.

"The accused is to be delivered up, not to be punished, not to be detained for life, but to be *tried*, and if acquitted, to be set at liberty. Not so in the matter under consideration. The person claimed is not to be delivered up, *unless* he was 'held to labor or service,' in another State; that is, unless he was *lawfully* held to service or labor there; nor *unless* he has *fled or escaped* into this State; that is, come into this State without the consent of his owner. And he is to be delivered up, not to the *claimant*, but only to the person, 'to whom such labor or service is due.' Here then are facts to be ascertained, not to be taken for granted, but to be lawfully proved and judicially determined; facts which lie at the foundation of the claimant's right; facts which involve the dearest rights of a human being, and which the claimant must establish according to law, before he can acquire any right to carry away his victim. And what legislator, under our Constitution, has a right to say that these facts shall be tried and definitely sealed in a summary manner, and without the verdict of a jury? The Constitution of the United States does not require any such departure from first principles. It only demands that we shall deliver up to his owner a *runaway slave*, when he has been proved to be such in due course of law. It does not require us to do it without proof, nor upon less or sufficient proof than such as would be sufficient to establish any other issuable fact in our courts of justice.

"A case has been cited from 5 Searg. & Rawl. 62, in which it is said that the Court of Pennsylvania decided that it would not review the proceedings before the inferior magistrate, because the Constitution of the United States requires the *slave* to be given up; and when it was urged that whether *slave or not slave* is a question to be settled *here*, the answer borrowed from that case was, that no injustice would be done to the prisoner, because he can assert his freedom in the place to which he may be transported, and we are bound to presume that he will there have a fair trial. So long as I sit upon this bench, I never can—no, I never will—yield to such doctrine. What, first transport a man out of the State, on the charge of his being a slave, and try the truth of the allegation afterwards—separate him from the place, it may be, of his nativity—the abode of his relatives, his friends, and his witnesses—transport him in chains to Missouri or Arkansas, with the cold comfort that if a freeman he may there establish his freedom! No, if a person comes into this State, and *here* claims the servitude of a human being, whether white or black, *here* he must prove his case, and *here* prove it according to law, and if our legislature have a right to create and regulate a tribunal before whom such proof is to be made, this court, unless restrained by the same authority, have a right and are solemnly bound to review and correct its proceedings.

"But without pronouncing a settled opinion, that the act of this State is unconstitutional on the ground that it deprives the accused of a trial by jury, it remains to be considered whether the provisions of the statute have been complied with."



275, declares the punishment for kidnapping any person "bond or free" with intent to send out of the State.

**1844.**—A new Constitution. Art. 1, a Bill of Rights, attributes rights to all persons as natural and unalienable. Art. 2 confines the suffrage to whites.<sup>1</sup>

**1846.**—A Revision. *An act to abolish slavery*, R. S. p. 382. Sec. 1. "That slavery in this State be and it is hereby abolished, and every person who is now holden in slavery by the laws thereof be and hereby is made free, subject however to the restrictions and obligations hereinafter mentioned and imposed, and the children hereafter to be born to all such persons shall be absolutely free from their birth and discharged of and from all manner of service whatsoever." 2. All "such persons" shall be bound as apprentices to their former owners. Other sections provide how such apprentices may be discharged, against removing them from the State, and other ordinary provisions. Sec. 27 declares it lawful for non-residents traveling to bring and carry away slaves, not more than the "usual number" of household slaves.

#### § 553. LEGISLATION OF THE STATE OF PENNSYLVANIA.

**1776.**—Sept. First Constitution. Ch. I. sec. 1, declares all men born equally free, &c., &c. Ch. II. sec. 6, declaring the elective franchise, makes no distinction between freemen in respect to color.

**1780.**—March 1. *An act for the gradual abolition of slavery*. 2 Carey & Bioren's Laws, 246. After reciting in sec. 1, 2, the motives of the act,<sup>2</sup> sec. 3 enacts, "That all per-

<sup>1</sup> In *State v. Post*, 1 Zab. 699, S. C., and *State v. Van Buren*, Spencer, 368, it was held that slavery had not been abolished in New Jersey by the Constitution.

<sup>2</sup> The first section, affirming gratitude to God for deliverance from "that condition to which the arms and tyranny of Great Britain were exerted to reduce us," &c., declares,—"Impressed with these ideas we conceive that it is our duty, and we rejoice that it is in our power, to extend a portion of that freedom to others which hath been extended to us, and release from that state of thralldom to which we ourselves were tyrannically doomed and from which we have now every prospect of being delivered. It is not for us to inquire why, in the creation of mankind, the inhabitants of the several parts of the earth were distinguished by a difference in feature or complexion. It is sufficient to know that all are the work of an Almighty hand. We find," &c. \* \* "We esteem it a peculiar blessing granted to us that we are enabled this day to add one more step to universal civilization,



sons, as well negroes and mulattoes as others, who shall be born within this State from and after the passing of this act shall not be deemed and considered as servants for life or slaves; and that all servitude for life or slavery of children in consequence of the slavery of their mothers, in the case of all children born within this State from and after the passing of this act as aforesaid, shall be and hereby is utterly taken away, extinguished, and forever abolished." 4. Provides that negro and mulatto children born after this act, shall be servants until twenty-eight years of age, to be in the condition of servants bound by indenture. 5. Requires all slaves to be registered. 6. Owners liable for support, unless emancipating before they arrive at twenty-eight years. 7. Negroes to be tried like other inhabitants. 8. Slave sentenced to death to be appraised. 9. Reward for taking runaway negroes the same as in case of white servants. 10. None to be deemed slaves but those registered,<sup>1</sup> and "except the domestic slaves attending upon Del-

by removing as much as possible the sorrows of those who have lived in undeserved bondage, and from which, by the assumed authority of the kings of Great Britain, no effectual legal relief could be obtained. Weaned, by a long course of experience from those narrow prejudices and partialities we had imbibed, we find our hearts enlarged with kindness and benevolence towards men of all conditions and nations; and we conceive ourselves at this particular moment extraordinarily called upon, by the blessings which we have received, to manifest the sincerity of our profession and to give a substantial proof of our gratitude."

Sec. 2. "And whereas the condition of those persons who have heretofore been denominated negro and mulatto slaves has been attended with circumstances which not only deprived them of the common blessings that they were by nature entitled to, but has cast them into the deepest afflictions, by an unnatural separation and sale of husband and wife from each other and from their children, an injury the greatness of which can only be conceived by supposing that we were in the same unhappy case. In justice, therefore, to persons so unhappily circumstanced, and who, having no prospect before them whereon they may rest their sorrows and their hopes, have no reasonable inducement to render their services to society, which they otherwise might, and also in grateful commemoration of our own happy deliverance from that state of unconditional submission to which we were doomed by the tyranny of Britain," &c., &c.

<sup>1</sup> *Kauffman v. Oliver* (1849), 10 Barr, 516, per Coulter, J., "From that time [the passage of this act] Pennsylvania has been deemed and taken as a free State, and as such assented to the compact of Union."

<sup>2</sup> *Respublica v. Negro Betsy*, 1 Dallas, 469.

<sup>3</sup> *Miller v. Dwilling*, 14 S. & R. 422. The child of a servant until the age of twenty-eight years cannot be held to servitude for the same period and on the same conditions as its mother, who was the daughter of a registered slave. *Comm. v. Holloway*, 2 S. & R. 305, the child born in Pennsylvania of a woman slave, fugitive from another State, is free-born and not liable to service for the twenty-eight years.

legates in Congress from the other American States, foreign ministers and consuls, and persons passing through or sojourning in this State and not becoming resident therein, and seamen employed in ships not belonging to any inhabitant of this State nor employed in any ship owned by any such inhabitant. *Provided*, such domestic slaves be not aliened or sold to any inhabitant nor (except in the case of members of Congress, foreign ministers and consuls) retained in this State longer than six months." 11. *Provided*, that this act "shall not give any relief or shelter to any absconding or runaway negro or mulatto slave or servant who has absented himself or shall absent himself from his or her owner, master or mistress residing in any other State or country, but such owner, &c., shall have like right and aid to demand, claim, and take away his slave or servant as he might have had in case this act had not been made." (Repealed by law of 1826.) 12, 13. To prevent evasions of this act by bringing in negroes to serve for long terms, enacts that no covenant of service be good for more than seven years, &c. 14. Repeals the colonial acts of 1705, for the trial of negroes; of 1725, for the regulating, &c.; of 1761 and 1773, for laying duties on negroes imported.

An exception to the operation of this act as made by an act of 1781 (Carey & Bioren, ch. 942), relating to persons compelled by the enemy to take refuge within the State; and another by act of 1782, as to registry in certain border counties.<sup>2</sup>

**1785.**—An act relating to German servants imported and their indentures, 3 Carey & Bioren, c. 1151.<sup>3</sup>

**1788.**—An act to explain and amend the act of 1780. 3 Carey & Bioren, c. 1334, reciting abuses, provides, sec. 1, that slaves brought in by persons intending to reside shall be free.<sup>4</sup>

<sup>1</sup> Comm. ex. rel. Lewis v. Holloway, 2 Binney 213, the privilege in the case of members of Congress is not limited to the time in which Congress is in session.

<sup>2</sup> Pennsylv. v. Blackmore (1796), Addison's R. 283, noteworthy as showing the temper of the time; a case under this statute.

<sup>3</sup> In Resp. v. Keppel, 2 Dallas, 197, S. C., 1 Yeates, 233, the difference between the condition of indentured servants and apprentices is laid down by the court, holding that a resident minor cannot be bound out to serve generally, without reference to his learning some trade. See also the distinction in *Altemus v. Ely*, 3 Rawle, 305.

<sup>4</sup> In *Belt v. Dalby* (1786), 1 Dallas, 167, the court maintained the slavery of one



2. Slaves or servants not to be removed out of the State without their consent, testified by two justices, under penalty. 3. Persons having children liable to serve until twenty-eight years must make entry. 5. Vessels employed in the slave trade declared liable to forfeiture. Penalty for building, &c., for that trade. 6. Parents and children, husbands and wives, being slaves or servants for years, not to be separated more than ten miles. Penalty for forcibly carrying away a servant or slave.<sup>1</sup> (This sec. repealed by act of 1826.)

**1790.**—A new Constitution, art. III. sec. 1. "In elections by the citizens, every freeman of the age," &c., shall enjoy the right of an elector. Art. IX. is a Bill of Rights, in the same terms as in the first Constitution.

**1820.**—*An act to prevent kidnapping.* Bioren's laws, c. 4858. Sec. 1. Declares that the offence of taking away or seducing, &c., to places out of this Commonwealth, &c., "any negro or mulatto," with intent to keep, &c., such person "as a slave, or servant for years," shall be a felony punishable by fine and imprisonment. 2. Declares the offence of selling such with intent, &c. 3. "That no alderman or justice of the peace of this Commonwealth shall have jurisdiction or take cognizance of the case of any fugitive from labor from any of the United States or Territories, under a certain act of Congress," &c. (referring to the act of 1793), "nor shall any alderman or justice of the peace of this Commonwealth issue or grant any certificate or warrant of removal of any such fugitive from labor as aforesaid upon the application, affidavit, or testimony of any person or persons whatsoever, under the said act of Congress or under

who had been brought into the State in 1784, after the act for the gradual abolition of slavery. This case is important as explaining the legal basis of slavery in Pennsylvania. A poor-law act of 1803, Bioren's L. c. 2357, contains provisions as to the settlement of slaves and servants. An act of 1821, Bioren's ed. c. 5071, that a person bringing in an indentured black or colored servant above twenty-eight years shall be liable for the maintenance. Similar is sec. 26 of a poor-law of 1836. Dunlop's Dig. c. 444.

<sup>1</sup> *Respublica v. Richards* (1795), 2 Dallas, 224, the defendant was indicted for forcibly removing a negro brought from Virginia by his owner. The court held that the enactment did not apply to persons in that position. *A fortiori*, it would not include fugitive slaves. But it is to be noticed that this case was decided in view of the local law alone (act of 1780, § 10), which then recognized the right of the master.

any other law, authority, or act of the Congress of the United States." Any alderman or justice so acting, declared guilty of a misdemeanor, punishable by fine. 4. That it shall be the duty of any judge or recorder of any court of record of the Commonwealth, when he grants or issues any certificate or warrant of removal of any negro or mulatto claimed to be a fugitive from labor, to the State or territory from which he or she fled—referring to the act of Congress—he shall make a record to be filed in the "office of the clerk of the General Quarter Sessions of the peace," &c.

**1825-6**, Sess. L. c. 50. *An act to give effect to the provisions of the Constitution of the United States relative to fugitives from labor, for the protection of free people of color, and to prevent kidnapping.* Sec. 1, 2, are re-enactments of sec. 1 and 2 of the foregoing. 3. Directing the mode of proceeding to recover persons claimed as fugitives, directs issuing of a warrant by any judge, justice of the peace or alderman, returnable before the judge, if issued by one; returnable, if issued by a justice of the peace or alderman, before "a judge of the court of Common Pleas or of the District Court, as the case may be, of your proper county, or recorder of a city."<sup>1</sup> 4. Of the evidence necessary when application for a warrant is made by an agent. 5. Duty of the judge, &c., to make a record of the application and file the same. 6. The judge before whom the warrant is returnable, may, on being shown to his satisfaction that the person claimed is, &c., give a certificate, which shall be a warrant to remove him. *Provided* "that the oath of the owner or owners or other persons interested shall in no case be received in evidence." 7. Fugitive to be committed to jail, when party not prepared for trial. 8. Fees. 9. Forbids aldermen and justices of the peace to take jurisdiction of these cases under the law of Congress. 10. Requires the record to be filed as in the preceding act. 11. Declares sec. 11 of the act of 1780, and sec. 7 of the act of 1788, to be supplied and repealed by this act.<sup>2</sup>

<sup>1</sup> The words of the writ prescribed by this statute.

<sup>2</sup> This act, with those of 1780, 1788, are given in the special verdict in Prigg's case, 16 Peters, 543-556, where this statute was held to be unconstitutional.



**1826-7, Sess. L. No. 196.** *An act to prevent certain abuses of the laws relative to fugitives from labor*, recites that persons alleged to be slaves of persons in other States are sold here as slaves, &c., enacts that all sales hereafter made of any fugitives from service or labor, being at the time of sale in this State, shall be void, and that if any person under pretence of such sale shall seize or remove from the State any fugitive so sold, it shall be punishable by fine of \$500.<sup>1</sup>

**1838.**—*An amended Constitution.* Art. III. sec. 1, "In elections by the citizens every white freeman of the age," &c. (and no mention is made of any others), shall be entitled to vote.<sup>2</sup> Art. IX. is a Bill of Rights like the former.

**1847, March 3.** *An act to prevent kidnapping, preserve the public peace, prohibit the exercise of certain powers heretofore exercised by judges, justices of the peace, aldermen, and jailors in this Commonwealth, and to repeal certain slave laws.* Sec. 1. Declares the punishment of the offence of taking, &c., away from the State by fraud or violence, or enticing by fraud or false pretence, any negro, &c. 2. Re-enacts the act of 1826-7, also declaring such sale punishable by fine and imprisonment. 3. Forbids any alderman or justice of the peace to act under the law of 1793, and declares any so acting guilty of a misdemeanor, punishable by fine and removal. 4. That "if any person or persons claiming any negro or mulatto as fugitive from servitude or labor shall under any pretence of authority whatsoever, violently and tumultuously

<sup>1</sup> In *Kanffman v. Oliver* (1846), 10 Barr, 516, error from the Common Pleas; held that an action at common law does not lie in this State for harboring runaway slaves or for hiding them to escape from their owners; that on the authority of *Prigg's case* the State law of 1826-7, so far as it applies to fugitive slaves, is inoperative, and the State judges should not act under the law of Congress, such action being contrary to the policy of the State as indicated by its legislation.

<sup>2</sup> In *Hobbs v. Fogg*, 6 Watts, 563, on a negro's claim to vote in 1835, held that the term "freeman" is used in a political sense in this clause, and does not designate one who is free of condition merely; that a negro cannot be in Pennsylvania a freeman in this sense. Chief Justice Gibson delivering the opinion, credits the report of a decision in 1795, that negroes could not vote. He also seemed to think that their capacity in this respect might be affected by the Constitution of the United States, p. 560:—"Yet it is proper to say that sec. 2 of art. 4 of the Federal Constitution presents an obstacle to the political freedom of the negro which seems to be insuperable. It is to be remembered that citizenship as well as freedom is a constitutional qualification, and how it could be conferred so as to overbear the laws imposing countless disabilities on him in other States is a problem of difficult solution." See remark on this case *post* in Ch. XXIII.



seize upon and carry away to any place, or attempt to seize and carry away in a riotous, violent, tumultuous and unreasonable manner, and so as to disturb or endanger the public peace, any negro or mulatto within this Commonwealth, either with or without the intention of taking such negro or mulatto before any district or circuit judge, the person so offending against the peace of this Commonwealth shall be deemed guilty of a misdemeanor," punishable by fine and imprisonment. (Sec. 3, 4, appear in the revised code of 1860.) 5. "Nothing in this act shall be construed to take away what is hereby declared to be invested in the judges of this Commonwealth, the right, power, and authority at all times, on application made, to issue the writ of habeas corpus, and to inquire into the causes and legality of the arrest and imprisonment of any human being within this Commonwealth." 6. Forbidding the use of the prisons of the State for detention of fugitive slaves.<sup>1</sup> (Rep. in 1852, Sess. L., p. 295.) 7. Repeals so much of the act of 1780 as authorizes the masters or owners of slaves to bring and retain such slaves within this Commonwealth, for the period of six months, in involuntary servitude, or for any period of time whatsoever,<sup>2</sup> and so much of said

<sup>1</sup> *Commonw. v. Taylor* (1849-50), 3 Monthly Law Rep., 576, was an indictment under the 4th and 6th sections. The alleged slaves had been imprisoned on the charge of horse-stealing committed in Virginia, from which custody they were discharged by proper order. "It was in evidence that the defendants, on learning the decision of the court discharging the negroes, stationed themselves within the entrance to the prison for the purpose of capturing them as fugitive slaves, and, on their being turned into the passage by the jailer, at once seized upon their persons, detained them there for some time, during which a severe struggle ensued between Mr. Taylor and those assisting him and the alleged fugitives, aided by some negroes of Harrisburg. Finally the slaves were ironed, and about that time the whole party was directed to be locked up in prison on account of a supposed breach of the peace." In reference to the violation of the fourth sec. the Court charged that the right of the owner to seize his slave was given by the act of Congress of 1793; that as the State law could not take from him this right, there was no breach of the peace, or riot, on his part, in the transaction. The Court does not attempt to distinguish whether the seizure was made for the purpose of bringing before a court for the purpose of making a claim, or to remove the alleged slaves out of the State. In *Commonw. v. Alberti* (1847), 2 Parson's Select Cases, 495, an indictment for removing the child born of a fugitive-slave woman was sustained under this statute. From these cases it appears that it is at least necessary for the defendant to prove the slavery of the person removed.

<sup>2</sup> *Pierce's case*, in *Common Pleas, Phila.*, Oct., 1848, 1 Western Legal Obs., 14, that since this act a slave brought into this State by his master, voluntarily, be-

act as prevents a slave from giving testimony against any person whatsoever be, and the same is hereby repealed. (Brightly's Dig. of 1858, *Negroes*. Sec. 13-20.)

§ 554. LEGISLATION OF THE STATE OF DELAWARE.

**1776**, Sept. 11. A Declaration of the Fundamental Rules of the Delaware State, formerly stiled The Government of the counties of Newcastle, Kent, and Sussex, upon Delaware. Sec. 1. "That all government of right originates from the people, is founded on compact only, and instituted solely for the good of the whole." 10. "That every member of society hath a right to be protected in the enjoyment of life, liberty, and property," &c. 12. "That every freeman, for every injury done him in his goods, lands, or person, by any other person, ought to have remedy," &c., "according to the law of the land." There is no declaration of the equality of all mankind, or of rights as being natural and inalienable. 1 Del. Laws, Ap. p. 79. —, Sept. 20. Constitution agreed on. Art. 24 continues in force all acts of Assembly not contrary to the resolutions of Congress, or of the late House of Assembly of the State. Art. 25 has a recognition of the common and statute law of England, if not repugnant to the Constitution and declaration of rights. Art. 4 limits the elective franchise to whites. Art. 26. "No person hereafter imported into this State from Africa ought to be held in slavery under any pretence whatever, and no negro, Indian, or mulatto slave ought to be brought into this State for sale, from any part of the world." Ibid.

**1787.**—*An act to prevent the exportation of slaves and for other purposes.*<sup>1</sup> Del. Laws, p. 884. Recites that "sundry negroes and mulattoes, as well freemen as slaves, have been exported and sold into other States, contrary to the principles of"

comes *ipso facto* free. And see *Kauffman v. Oliver* (1849), 10 Barr, 516, as to the existing law and policy of the State.

There appears to be no statute in Pennsylvania authorizing the governor to surrender fugitives from justice, unless it be in the Code of 1860, which I have not seen.

<sup>1</sup> *State v. Turner*, 5 Harrington, 501, *exporting* is carrying out with intention to sell.



humanity and justice, and derogatory to the honor of this State." Sec. 1. Declares a fine for exporting a slave without permit. 8. Penalty for exporting a negro who is or may be entitled to freedom. 3-6. Ratifying former manumissions where no security was given and dispensing with security in future cases, if slave be neither old or infirm. 7. Persons bringing a slave into this State shall forfeit 20*l.*, and the slave shall be free. (A law of 1822 provides for farms which extend over the State line. Rev. of 1829, p. 502.) 8. Manumitted slaves shall not vote, nor hold office, nor give evidence against whites,<sup>1</sup> nor "enjoy any other rights of a freeman other than hold property and to obtain redress in law and equity for any injury to his or her person or property." 9. Free negro, for horse-stealing, shall be transported to the West Indies or elsewhere and sold for a term of years. 10. This act not to extend to immigrants or to travelers.<sup>2</sup>

1789.—An act supplementary to the last. *Ib.* p. 941. Sec. 1. Allows introduction of slaves devised or inherited. 2. Slaves of citizens of other States, in this State, may be attached for owner's debts. —. Another supplement. *Ib.* p. 941. Preamble recites the injustice of the African slave trade. Sec. 1. Declares forfeiture of vessels equipped for this trade. 2. Ad-

<sup>1</sup> A free negro cannot be witness between whites. *Collins v. Hull* (in 1793), 6 *Hall's Am. Law Journal*, 461; *Tindal v. Hudson* (1838), 2 *Harrington*, 441, that free negroes cannot hold slaves in Delaware; that the principle of conquest is the basis of slavery of negroes to whites; that a negro cannot hold a negro on this principle; it would be "a species of slavery hitherto unknown;" that the free negro is not such a freeman as to extend the protection requisite from master to slave, &c. A father cannot hold his child as a slave. "We ought not to recognize the right of a father to hold his own children in slavery. Humanity forbids it. The natural rights and obligations of a father are paramount to the acquired rights of the master."

<sup>2</sup> The words are—"Provided that nothing in this act shall be construed to extend to or affect any persons who may move into this State from any other State, with his or her family, and become residents thereof, or who may be traveling through the same with his or her servants or slaves, or any inhabitants of this State moving with his or her family into any other State." In *Newton v. Turpin* (1837), 8 *Gill and Johnson*, 433, the word *State* in this act is held to include the District of Columbia. *Dorsey, J.*: "To give the word *State* in this act of assembly the literal technical meaning ascribed to it would be to violate its spirit, the sound and obvious meaning of the law. We do not hold ourselves bound, when interpreting its import in reference to rights of property, to give it the same literal restricted interpretation which it has on some occasions received when used in reference to a grant of special limited jurisdiction."

ditional penalty for exporting a slave without permit. 3-5. Slaves in capital cases shall be tried by jury,—repealing older laws. An act of 1829, provides for licenses for bringing slaves to and from Maryland. Rev. of 1829, p. 501. A new law in 1833. Rev. Code, ch. 80, §§ 1-4.

**1790.**—An act on marriages. Ib. p. 972, contains provisions as to servants' marriages.

**1792.**—A new Constitution. Art. I. a Bill of Rights—does not contain any universal attribution of rights, or declare the natural equality of all men. Art. IV. The elective franchise is limited to white free men.

**1793.**—*An act to punish the practice of kidnapping free negroes and free mulattoes, and for other purposes.* Ib. p. 1093. Sec. 1. Declares punishment by whipping, standing in the pillory, with the ears nailed and then cut off. 2. Bail required under these acts. 3, 4. Of granting permits to export slaves; and that every slave otherwise exported shall thereby become free.<sup>1</sup>

**1795.**—An act repealing that part of "*an act against adultery and fornication*" (1721) which makes children of a white woman, by a negro or mulatto father, liable to servitude for thirty-one years, reciting—"whereas it is unjust and inhuman to punish the child for the offence of the parent." Del. Laws, p. 1201.

**1797.**—*An act concerning negro and mulatto slaves.* Ib. p. 1321. Sec. 1. Slaves shall not be set free by verbal contracts. 2, 3. How manumissions shall be executed and recorded. 4. Actions on agreement to manumit must be founded on a writing. 5. But slaves shall be made free by attempt to

<sup>1</sup> Held in *Allen v. negro Sarah* (1838), 2 Harrington, 435, not to be contrary to the Constitution of the United States, 4th art. sec. 2. *Per curiam*, 16, 439:—"Similar laws have been passed in several of our sister States; which laws have been subjected to the examination and received, incidentally, the sanction of the Supreme Court of the United States. \* \* \* \* The property in slaves is not an absolute but a qualified property. It is the right to the enjoyment of the services of the slave during his life. It is not such a right of property as gives the power of unlimited control over the slave. The slave has rights. He is under the protection of the law, and it was for his protection, as well as for subserving the principles of humanity that the law of 1793 was passed. The general policy of that law and its operation and influence over this unfortunate race of human beings have been found to be beneficial."



export, as provided by the above-mentioned acts; and slaves may be still emancipated by last will. 6. Security to be given where already required by law. 7. Appeals allowed, to the highest court, in suits for freedom. 8. Slave, for attempting rape on a white woman, on trial before two justices and six freeholders, may be punished by whipping, nailing to the pillory, and loss of ears. 9. A slave, for beating another slave or a free negro, shall be whipped after trial before two justices. (See new criminal code of 1827.)

**1798.**—A law about sale of liquors at elections. 3 Del. L. p. 7, contains provisions regulating slaves and free negroes, at the places of holding elections. Incorporated in an election law of 1825. Rev. Code of 1852, ch. 16, §§ 18–21.

**1799.**—An act to allow free black persons and free mulattoes in *certain cases to give testimony in courts of justice*. 3. Del. L., 80. In all criminal prosecutions, when no white was present, &c., the testimony of blacks may be received; *proviso*, but not in charges of bastardy against a white man. Rev. C., c. 107, § 4.

**1807.**—*An act for the better regulation of free negroes and free mulattoes*. 4 Del. L., p. 108. Sec. 1. Non-resident free negroes prohibited coming to reside in this State; such are to be warned to depart, on neglect thereof, to be arrested and, on conviction, fined. *Proviso*, that any bringing certain testimonials of their being free and of good character, may remain. 2. How to be warned. 3. Who non-resident negroes. This act not applicable to seafaring persons. (Rev. C., ch. 52.) 4–6. Free negroes convicted of larceny may be sold to make restitution; purchasers having liberty again to sell, making assignment before a justice. 7. Negroes and whites prohibited to intermarry, and such unions declared void. 8. Penalty on minister, &c., for marrying. (Rev. C., ch. 74.) 9. Penalty by fine on white woman having bastard by a negro. 10. Penalty by fine on white men guilty of fornication with negroes; *proviso*, that no negro's evidence be received on such cases.

**1808.**—*An act for the better securing of personal liberty*, 4 Del. L. 215, relates to insolvent debtors. Sec. 7. Declares



persons convicted at the Sessions, and unable to pay fines, fees, &c., may be disposed of by the Sheriff as servants for time. See repealing act in 1839.

**1810.**—*An act concerning negroes and mulattoes.* 4 Del. L., 337. Sec. 1. Negroes manumitted to be free at a future period, to be deemed, in the meantime, slaves. 2. The issue of such female negro shall be slaves, the males until 25, the females until 21 years.<sup>1</sup> 3, 4. Applies to negroes brought in, who have been so manumitted in other States. 5. Penalty by fine for attempting to export such negro; the negro to be free. 6. For absenting themselves such negroes may be punished by an extension of their service. 7. Such negroes and their issue to be registered, and certificates issued. Rev. Code of 1852, ch. 80, §§ 7-12.

**1811.**—*An act to prohibit the emigration of free negroes or mulattoes into this State, and for other purposes.* 4 Del. L., 400. Re-enacts the law of 1807, and directs that for non-payment of fine such negroes shall be sold for terms of years. 6. A resident negro remaining out of it for six months to be deemed a non-resident. Exception as to sailors, &c. 7. Penalty on hiring a non-resident negro. (Rev. C., ch. 52, §§ 1-3.) A supplementary law of 1833, D. L., c. 276, permits negroes remaining, on obtaining a license from a judge. —. *An act respecting free negroes, &c.* 4 Del. L., 408. That free negroes convicted of larceny may be sold.

**1816.**—*An act concerning free negroes, free mulattoes, servants, and slaves.*<sup>2</sup> Rev. of 1829, p. 413, relates to the apprehension and return of runaway slaves. Sec. 3-5. Persons apprehended as such are to be taken before a justice of

<sup>1</sup> See under this act *Jones v. Wootten*, 1 Harrington, 85, Opinion of Harrington, J., as describing the nature of slavery in this State: "It is true that slavery is tolerated by our laws; but it is going too far to say that this kind of property in slaves is precisely like every other species of property. The spirit of the age, and the principles of liberty and personal right, as held in this country, are," &c. In this case held, that before this act the issue of born of slaves to be free at a future time were slaves; but *contra* in *Negro Ann Elliott v. Twilley*, 3 Harrington, 192.

<sup>2</sup> *Davis v. Curry* (1810), 2 Bibb, Ky., 238. Colored person brought from Delaware is presumed to be a slave, unless it be proved that the laws of Delaware since the Revolution have abolished slavery.

the peace, and committed by him for cause. The Sheriff forbidden to deliver up any person claimed as a slave without written order of the justice, who is to grant it only on reasonable proof. 7. Against harboring the slaves of others. 9. A proviso that this shall not affect travelers, &c., nor affect any sheriff, gaoler, or other person, "acting under the authority of a judge, a justice of the peace, pursuant to the act of Congress," of 1793, for fugitive slaves. (The other sections are not given in Rev. of 1829.) Rev. C. of 1852, ch. 80, §§ 13-15.

**1819.**—An act to provide indemnity against manumitting slaves. Ibid, p. 414. Rev. C., ch. 80, § 6.

**1826.**—*An act relating to fugitives from labor.* D. L. c. 316 (Rev. of 1829, p. 291). Sec. 1, 2, provide that when any person held to labor or service in any State or territory shall escape into this State, the owner, &c., is authorized to apply to any judge or justice of the peace or any burgess of a borough or town corporate; and the judge, &c., shall issue a warrant for the arrest of the alleged fugitive, take proof of the claim and give a certificate, which shall be warrant for removing him. 4. Penalty for obstructing the claimant, &c. 4. Penalty for transporting slave from the State by water; recoverable by the owner. 5. Suspicious colored persons may be arrested as runaways. (Rev. c. 80.) 6. On duty of grand juries. (Repealed by, 1835, L. c. 326.) —. D. L., c. 362. A new crimes act; repeals many earlier laws affecting slaves and free negroes. Sec. 12. That slaves charged with crime punishable capitally, are to be tried as freemen.

**1827.**—*An act concerning apprentices and servants.* D. L. c. 41. Sec. 1, that no white person shall be bound as a servant. —, *An act concerning certain crimes and offences committed by slaves and for the security of slaves properly demeaning themselves*, L. c. 50. Rev. of 1829, pp. 149-156. Sec. 1. The general criminal code of 1826, for crimes punishable with death, made applicable to slaves. Other sections provide for punishment of other specified offences by whipping and exportation for sale; also re-enactments against exporting and importing slaves. 11. The term *slaves* here used, includes slaves for time, as



under the law of 1810. 12. Repealing the former laws. An additional act as to punishment of manslaughter in 1829. Rev. p. 156. (There seems to have been no statutory discrimination of the crime of killing a slave.) Rev. Code of 1852, c. 80, §§ 25-35.

**1829.**—An act authorizing the courts to grant licenses in proper cases for exporting and importing slaves. L. c. 144.

**1831.**—A new Constitution<sup>1</sup> with a preamble attributing rights to "all men by nature," and that "for the due exercise thereof power is inherent in them," &c. Art. IV. sec. 1 limits the elective franchise to whites.

**1832.**—*An act to prevent the use of fire-arms by free negroes, &c.*, allows certain exceptions, (by 1835, p. 338, licenses to use guns may be given; prohibited by 1843, p. 552; punishment enacted by 1851, p. 537;) provides to enforce the law of 1811 against immigration; prohibits meetings of blacks after ten o'clock; non-resident blacks may not preach. See Rev. C., c. 52.

**1833.**—Suppl. to an act on marriage. L. c. 194. License on marriage of free blacks not required, but certificate of freedom, and in case of the marriage of a servant or slave, the written consent of the master. Rev. C. p. 237.

**1839.**—An act suppl. to the criminal code. L. c. 214, gives discretion to courts in punishment of free blacks for larceny, and repeals so much as authorizes the sale of white convicts.

**1841.**<sup>2</sup>—In L. c. 363, and 1843, L. c. 466, a distinction is made between black and white insolvents in their liability to imprisonment.

**1849.**—An act, L. c. 411, declaring it unlawful for any to remain in the State who have been convicted of having enticed slaves. —. *An act in relation to idle and vagabond free negroes*, L. c. 412, authorizes their being hired out to compulsory service for wages. —, c. 334. Suppl. to law of 1811, recites that numbers of resident free negroes are in the habit of leav-

<sup>1</sup> This Constitution is the longest and most minute of the State Constitutions.

<sup>2</sup> A resolution of 1841, Feb., L. p. 441, condemns the action of the Governor of New York in the controversy with Virginia. *Ante*, pp. 10, 61.

ing the State during the working season, who return within the six months allowed by law, and in destitution; limits to sixty days the time of absence. R. C. c. 52, sec. 1.

**1851.**—*An act in relation to free negroes and slaves.* L. c. 59, prohibits emigration (except as to Maryland and certain counties), under penalty of being sold. L. 1855, c. 257, declares fines for bringing in such, prohibits free negroes from political meetings, and from holding camp-meetings. R. C. c. 52, §§ 1, 2.

**1852.**—A Revised Code.<sup>1</sup> Ch. 45, 52, and 80, contain a re-enactment in substance of the laws above cited. Ch. 97, §§ 30, 31, relate to jurisdiction of justices of the peace over offences of slaves. Ch. 80, §§ 20–24, provide for suits for freedom on petition and giving security for costs by next friend, to be tried in the Superior Court in “a summary way;” appeal allowed to the highest court; the master may be required to give security. Ch. 52, § 12, “no free negro or free mulatto shall be entitled to the privilege of voting at elections or of being elected or appointed to any office of trust or profit, or give evidence against any white person, except as is provided in chapter 107, or to enjoy any other rights of a free man, other than to hold property or to obtain redress in law or equity for any injury to his or her person or property.” By c. 107, sec. 4, they are competent witnesses in criminal cases, cases of bastardy charged on a white excepted, when no competent white witness appears to have been present.

**1857,** c. 392, amend c. 80 of code, increasing liabilities of railroads, &c., transporting slaves.

#### § 555. LEGISLATION OF THE STATE OF NORTH CAROLINA.

**1776,** Dec. 17.—In the Declaration of Rights the franchises are ascribed to “all freemen,” but sec. 19, that “all men have a natural and unalienable right to worship Almighty God according to the dictates of their own consciences.” Dec. 18.

<sup>1</sup> There seems to be no act of Delaware empowering the Governor to surrender persons claimed as fugitives from justice under the Constitution of the United States.

Constitution adopted.<sup>1</sup> By sec. 7, 8, 9, the elective franchise is ascribed to all adult freemen, with certain qualifications in respect to domicile, without distinction of color. (Changed by Constitution of 1835.) Sec. 40. "That every foreigner who comes to settle in this State, having first taken an oath of allegiance to the same," may hold, &c., land, "and after one year's residence shall be deemed a free citizen."

1777, c. 2, sec. 12. Declaring that Indians, negroes, &c., shall be incapable to witness, except in suits against each other, and in prosecutions of colored persons. Amended by a law of 1821. Extant in Rev. St. (of 1837), c. 111, § 50; and Rev. Code (of 1854), c. 107, § 71.<sup>2</sup> —, c. 6. *An act to prevent domestic insurrections, and for other purposes*, recites, "Whereas the evil and pernicious practice of freeing slaves in this State ought, at this alarming and critical time, to be guarded against by every friend and well-wisher to his country," prohibits manumission, except as by previous statute allowed (1741, c. 24, § 56), and prohibits slaves hiring themselves out. Additional are 1779, c. 12; 1788, c. 20. See Iredell's Law of N. C. ed. 1791. The existing law dates from 1830.

1778, c. 133. Declares "that all such parts of the common law as were heretofore in force and use in this State, or so much of the said common law as is not destructive of, or repugnant to, or inconsistent with the freedom and independence of this State and the form of government therein established, and which has not been otherwise provided for in the whole or in

<sup>1</sup> "By a Congress of the representatives of the freemen of the State of North Carolina, assembled at Halifax, &c., for the purpose of establishing a Constitution or form of government for the said State." This Congress also performed the functions of an ordinary Legislature. Rev. St. Pref. x. *State v. Manuel*, 4 Dev. & Bat. 25. Gaston, J.:—"It is a matter of universal notoriety that under it [the first Constitution of North Carolina] free persons, without regard to color, claimed and exercised the franchise, until it was taken from freemen of color a few years since by our amended Constitution." Ibid. p. 26, that free negroes and free persons of color are entitled, as citizens, to the protection of sec. 10 of the Bill of Rights, and sec. 39 of the Constitution. But see *post*, the laws of 1831 and 1840.

<sup>2</sup> *State v. Samuel*, a slave (1836), 2 Dev. & Batt. 177:—"The marriage of slaves, "consisting of cohabitation merely, by the permission of the owners," does not constitute the relation of husband and wife so as to attach to them the privileges and disabilities incident to that relation by the common law. Hence a slave's wife may give evidence against him, even in a capital case.



part, not abrogated, repealed, or become obsolete, are hereby declared to be in full force in this State." R. S. and R. C. c. 22.

**1779**, c. 5. For seizure and sale of cattle, &c., owned by slaves. Iredell, p. 378; R. S. c. 111, § 25, but not in R. C. of 1854. —, c. 7. Patrol law, increasing powers given by 1753, c. 6. Iredell, p. 388; R. S. c. 86, § 3; R. C. c. 83, § 3. —, c. 11. Declares death the penalty for stealing slaves or free negroes, or for inducing slaves to run away. Iredell, p. 370. Existing in R. S. and R. C. c. 34, §§ 10, 12.

**1783**, c. 14. Providing for summary trial and punishment of slaves for minor offences, by a justice of the peace. Iredell, p. 460. By 1842, c. 3, appeal to superior court is allowed. R. S. c. 111, §§ 41, 42; R. C. c. 107, §§ 32, 33.<sup>1</sup>

**1786**.—*An act to impose a duty on all slaves brought into this State, by land or water.* Sec. 1, in Potter's Dig. c. 249, imposes penalty to secure the return of slaves brought from States which might have passed laws for emancipation. (Other provisions superseded by the Constitution and laws of the United States.) Extant in R. S. c. 111, § 9; R. C. c. 107, § 7.

**1787**.—*An act to prevent thefts and robberies by slaves, &c.* Iredell, p. 609. Forbids slaves, &c., on vessels after sunset. R. S. c. 34, § 76; R. C. c. 34, § 93. —. Against entertainment of slaves by free negroes. R. S. c. 111, § 81; R. C. c. 107, § 64. —. Against marriage of free negro with slave, without consent of the master. Such marriages absolutely forbidden by act of 1830, c. 4, § 3. R. S. c. 111, § 61; R. C. c. 107, § 77.

**1788**, c. 7. Amending previous acts against dealing with slaves. Iredell, p. 633, with later acts existing in R. S. c. 34, §§ 75, 77; R. C. c. 34, §§ 83-92.

**1791**, c. 4. On the same matter, also declares killing a slave, if malicious, to be murder. (By 1801, c. 21, clergy is taken away.) Penalty for enticing slaves to abscond. See R. S. c. 34, § 73; R. C. c. 34, § 81. Punishment of slaves for forging passes. R. S. c. 111, § 21; R. C. c. 107, § 31.

<sup>1</sup> State v. Bill, 13 Iredell, 373, as to what may be an offence in a slave.

**1793**, c. 5. *An act to extend the trial by jury to slaves*, with an act of 1794, c. 10, see Martin's Dig. ed. 1804. By 1807, c. 719, they are to be tried for capital crimes in county court. 1816, c. 912; 1825, c. 129; for felonies, &c., they shall be tried as freemen are. Extant in R. S. c. 111, §§ 42-49, combining later acts, and in R. C. c. 107, § 34, declaring that for felonies, &c., they shall be tried as freemen are, the jury to consist of slave-owners.<sup>1</sup>

**1794**, c. 2. *An act to prevent the further importation of slaves and indented servants of color into this State*. Martin's Dig. Prohibits, with exception in case of owners coming to reside, or of citizens inheriting slaves held in other States.

—, c. 4. Recites the mischiefs from slaves hiring out to them their time and prohibits it; additional is 1802, c. 15. (See R. S. c. 111, §§ 31-33. R. C. c. 107, § 28.<sup>2</sup>) The first of these acts, sec. 4, 5, and the second, sec. 2, with the act of 1816, c. 16, sec. 3, relate to assemblies of slaves, the authority of patrols: extant in R. S. c. 86, §§ 3, 33, R. C. c. 83, §§ 3, 30.<sup>3</sup>

**1795**, c. 16. *An act to prevent any person who may emigrate from any of the West Indies or Bahama Islands, or the French, Dutch, or Spanish settlements on the southern coast of America, from bringing slaves into this State, and also for imposing certain restrictions on free persons of color who may hereafter come into this State*. Martin's Dig. Forbids bringing negroes, as above, older than fifteen years. Free negroes are to give securities for behavior. Militia to be called out when any negroes may collect in arms. An act of 1796, c. 15, allows slaves to be brought in who may belong to residents near the Virginia and South Carolina boundaries.

<sup>1</sup> The State v. Charity (1830), 2 Devereux, 545. On an indictment against a slave for a capital offence, the master cannot be compelled to testify; and if the master waives his privilege, has not the slave a right to object to evidence of confessions made by the master—*Quære?* See the opinions in this case as illustrating the effect of the relation between master and slave on the moral responsibility of each.

<sup>2</sup> State v. Clemons, 3 Dev. 472. State v. Clarissa, 5 Iredell, 221.

<sup>3</sup> As to discretion allowed to patrols see State v. O'Neal, 1 Hawks, 418. As to what is allowable on festive occasions, see State v. Boyce, 10 Iredell, 536; Matthew's case, 2 Dev. & Bat. 424.

**1796.**—A new act against emancipation of slaves. Potter and Yancey's Dig. c. 453 (ed. 1821). The existing law begins with 1830, c. 9.

**1798**, c. 13. An act to compel owners of infirm slaves to support them. Extant in R. S. c. 89, §§ 19–23. R. C. c. 86, §§ 15–19.

**1801**, c. 20. Requiring owners who are permitted to emancipate slaves to give security against their becoming a charge. Martin's Dig. Superseded by the law of 1830, c. 9.

**1802**, c. 17. *An act to prevent conspiracies and insurrections among the slaves.* Martin's Dig. Potter & Yancey's, c. 618. Existing in R. S. c. 111, §§ 35, 40, 53; R. C. c. 107, §§ 35–41.

**1812**, c. 828. Negroes, &c., not to be mustered in militia, except as musicians. Re-enacted 1823, c. 1219. R. S. c. 73, § 5; R. C. c. 70, § 5. —, c. 859. Negro slaves not permitted to act as pilots, R. S. c. 88, § 44; the owner liable to forfeit the value of such slave, R. C. c. 85, § 39.

**1816**, c. 910. Slaves imported from foreign countries contrary to the act of Congress of 1807, to be sold for the benefit of the State. R. S. c. 111, §§ 1–8. R. C. c. 107, §§ 1–6. —, c. 912. An act for the more speedy trial of slaves, amended as to cases of conspiracy, &c., by 1831, c. 30. Governor to issue special commissions. R. S. c. 111, §§ 53–56. R. C. c. 107, § 41.

**1817**, c. 949. That “the offence of killing a slave shall be homicide and shall partake of the same degree of guilt, when accompanied with the like circumstances, that homicide does at common law.” R. S. & R. C. c. 34, 9.

**1818**, c. 981. Authorizes the sale of negroes taken up as runaways and not claimed. Existing in R. S. c. 111, § 16. R. C. 107, c. 19.

**1821**, c. 2180; also 1830, c. 8. Acts against harboring slaves. Existing in R. S. c. 34, § 73. R. C. c. 34, § 81.

<sup>1</sup> *State v. Tackett*, 1 Hawks. 210:—“It exists in the very nature of slavery that the relation between a white and a slave is different from that between free persons, and therefore many acts will extenuate the homicide of a slave which would not constitute a legal provocation if done by a white person.”



**1822**, c. 1129, § 8. A revenue law imposing a tax on slaves brought into the State for sale from other States. Existing in R. S. c. 102, § 16, but not in R. C. See the act of 1794. There seems to be no existing law against the introduction of slaves from other States.

**1823**, c. 1229. And act declaring that rape committed by a black on a white shall be punished with death. R. S. c. 111, § 78. R. C. c. 107, § 44.

**1826**, c. 13, and 1828, c. 32, against trading with slaves; extant in R. S. c. 34, §§ 75-78. R. C. c. 34, §§ 84-89. Also against slaves or free negroes and slaves trading together in articles which slaves may not sell to whites. R. S. c. 111, §§ 82-84. 1830, c. 7, and 1831, c. 28, to prevent free negroes peddling beyond their county without license. R. S. c. 111, § 85. R. C. c. 107, § 65.

**1826**, c. 21, 1830, c. 14, 1831, c. 13. Acts forbidding the immigration of free negroes, and providing remedies. Extant in R. S. c. 111, §§ 65, 75, 76, 86-89; R. C. 107, §§ 54-58, 75-77. Free negroes immigrating are subject to a fine of \$500 unless they remove, and in default may be hired out for payment, and are liable to repeated indictments until they remove. Resident free negro having voluntarily been absent ninety days is liable to the same penalties. The law does not apply to negroes on vessels or with travelers. "All free mulattoes descended from negro ancestors to the fourth generation inclusive, though one ancestor of each generation may have been a white person, shall be deemed free negroes, and persons of mixed blood."<sup>1</sup>

**1830**, c. 4. Declares the marriage of free negro with a white to be void. This was omitted in R. S. Re-enacted 1838, c. 24. R. C. c. 63, § 7. (See *State v. Hooper*, 5 Iredell, 201.) —, c. 5. *An act to prevent the circulation of seditious publications, &c.*, makes it a felony to incite insurrection among slaves, or circulate writings having that tendency. R. S. c. 34, § 17, 18. R. C. c. 34, § 16, 17. —, c. 6. *An act*

<sup>1</sup> The Constitution of 1835, Art. I. sec. iii. 3, declares that such persons shall not have the right of voting.



*to prevent all persons from teaching slaves to read or write ; the use of figures excepted.* Recites that such teaching has a tendency to excite dissatisfaction in their minds and produce insurrection, &c. ; forbids teaching or giving books. Extant in R. S. c. 34, § 74 ; c. 111, § 27. R. C. c. 34, § 82. —, c. 9. An act restricting emancipation. Extant in R. S., c. 111, §§ 57-64. R. C. c. 107, §§ 45-53. Emancipation may be allowed by the Superior Courts ; bond being given, by the owner or executors of an emancipating testator, that the slave shall quit the State within ninety days. If emancipated for meritorious services, may remain in the State on security having been given. In other cases must leave the State or be sold as a slave.<sup>1</sup> —, c. 10. *An act to prevent gaming with slaves.* R. S. c. 111, §§ 29, 79, 80. R. C. c. 107, §§ 62, 63. The act applies to free negroes. By 1850, c. 186, whites are likewise prohibited. R. C. c. 24, § 116.

**1830**, c. 16. New powers given to patrol, to arrest and punish negroes. R. S. c. 86, § 3. Another act, 1848, c. 73. Extant in R. C. c. 83, § 3.

**1830**, c. 30. An act to amend the quarantine laws, enacts that vessels having free negroes on board from other States are subject to thirty days' quarantine ; nor may any negro go on board such vessel. —, c. 156. An act to prevent slaves from attending muster on election grounds in certain counties. These last two acts do not appear in the revisions.

**1831**, c. 4. Regulating free negroes, &c. ; prohibits preaching, &c., by such ; and slaves keeping house, or going at large as freemen.<sup>2</sup> R. S. c. 111, §§ 31, 32. R. C. c. 107, § 28. —, c. 13. For collecting fines of free negroes ; authorizes them being sold for time.<sup>3</sup> R. S. c. 111, §§ 86-88. R. C. c. 107, § 75.

<sup>1</sup> Removing from the State is not a condition precedent to the emancipation. *Alvany v. Powell*, 1 Jones Eq., 35.

<sup>2</sup> *State v. Clarissa*, 5 Ired. 221. *State v. Nat.*, 13 Ired. 154.

<sup>3</sup> In *The State v. Manuel*, 4 Dev. & Bat. 23, this provision is held not to violate any clause in the State Bill of Rights, though it is also held that such Bill applies to all free persons, and that all such are citizens in the sense of the State Constitution, and that the extent of the word citizens is not dependent on political citizenship. Judge Gaston, delivering the opinion of the Court, said:—"According to the laws of this State all human beings within it, who are not

**1832, c. 9.** An act making punishable with death the offence of carrying away, or concealing for that end, any slave, "with the intent and for the purpose of enabling such slave to escape out of the State from the service of his owner," &c. R. S. & R. C. c. 34, § 11.

**1835.**—A new Constitution, and an amendment in 1835 extending the franchise, still limits it to free white men.

**1838, c. 24** declares void all future marriages "between a white person and a free negro, or free person of color to the third generation." R. C. c. 68, § 7.<sup>2</sup>

**1840, c. 30.** An act forbidding free negroes to wear or keep guns, bowie knives, &c., without having obtained licenses.<sup>3</sup>

The Revised Statutes above cited are of 1833, 1834. The penal laws on the subject are contained in c. 34. The other regulations in c. 111, entitled *Slaves and free persons of*

slaves, fall within one of two classes. Whatever distinctions may have existed in the Roman laws between citizens and free inhabitants, they are unknown to our institutions. Before our Revolution, all free persons within the dominions of the king of Great Britain, whatever their color or complexion, were native-born British subjects—those born out of his allegiance were aliens. Slavery did not exist in England, but it did in the British colonies. Slaves were not, in legal parlance, persons, but property. The moment the incapacity, the disqualification of slavery, was removed, they became persons, and were then either British subjects or not British subjects, according as they were or were not born within the allegiance of the British king. Upon the Revolution no other change took place in the laws of North Carolina than was consequent on the transition from a colony dependent on a European king to a free and sovereign State. Slaves remained slaves. British subjects in North Carolina became North Carolina freemen. Foreigners, until made members of the State, remained aliens. Slaves manumitted here became freemen, and, therefore, if born within North Carolina, are citizens of North Carolina, and all free persons born within the State are born citizens of the State. \* \* \* The Constitution extended the elective franchise to every freeman who had arrived at the age of twenty-one and paid a public tax; and it is a matter of universal notoriety, that under it free persons, without regard to color, claimed and exercised the franchise, until it was taken from free men of color a few years since by our amended Constitution."

<sup>1</sup> *Gober v. Gober*, 2 Hayw. 170:—Negro presumptively a slave; *aliter* as to mulatto.

<sup>2</sup> *State v. Watters*, 3 Ired. 455:—"A 'person of color' is one descended from negro ancestors to the fourth generation inclusive, though one ancestor in each generation may have been white."

<sup>3</sup> *State v. Newsom* (1844), held not unconstitutional in 5 Ire. 250. *Per curiam*, "We must therefore regard it as a principle, settled by the highest authority, the organic law of the country, that the free people of color cannot be considered as citizens in the largest sense of the term, or if they are, they occupy such a position in society as justifies the legislature in adopting a course of policy in its acts peculiar to them; so that they do not violate those great principles of justice which ought to be at the foundation of all laws." *State v. Manuel* is referred to as authority.



*color.* In this work the date and numbers of the acts from which the revision is compiled are noted at the foot of the page. The Revised Code of 1854 is a more condensed code, but with the same arrangement, it contains marginal references to the similar provisions in the R. S., with dates of the late enactments.<sup>1</sup>

**1840, c. 58.** Forbids, under penalty, the carrying slaves on ships, railroads, coaches, &c. R. S. c. 107, § 78.

**1858, c. 30.** An act providing for the hiring out of free negroes in discharge of fines. —, c. 31. Against sale of spirits by and to free negroes.

#### § 556. LEGISLATION OF THE STATE OF TENNESSEE.

The territory occupied by the present State of Tennessee was included within the limits of the State of North Carolina until ceded to the United States in 1790.<sup>2</sup> The law of North Carolina continued to be the law of Tennessee, and the statutes of the older State, prior to the date of cession, which have been already cited, appear in the Tennessee Digests. The only enactment passed before the admission of the State which relates to negroes, &c., is 1794, c. 1, sec. 32, that negroes and per-

<sup>1</sup> An act of 1810 (R. S. & R. C. c. 35, § 5), provides for arrest of persons charged with crime in other States, that they may await a demand as provided by act of Congress, but no provision appears giving special authority to the Executive to deliver up.

<sup>2</sup> In the act of cession by North Carolina of the territory included in the State of Tennessee, Feb. 25, 1790, is a provision that "the laws in force and in use in the State of North Carolina at the time, shall be and continue in full force within the territory hereby ceded until the same shall be repealed or otherwise altered by the legislative authority of the said territory." And also, "That no regulations made or to be made by Congress shall tend to emancipate slaves." The cession was accepted by Congress April 2, 1790. I Stat. U. S. 106. 2 B. & D. 85-89.

The Act of Congress May 26, 1790, an act for the government of the Territory of the United States south of the River Ohio. I Stat. U. S. 123; 2 B. & D. 104. Sec. 1. Provides that the Territory, "for the purposes of temporary government, shall be one District, the inhabitants of which shall enjoy all privileges, benefits, and advantages set forth in the ordinance of the late Congress for the government of the Territory of the United States northwest of the River Ohio, and that the government of the said Territory shall be similar to that which is now exercised in the Territory northwest of the Ohio; except so far as it is otherwise provided in the conditions expressed in an act of Congress of the present session, entitled 'An act to accept a cession of the claims of the State of North Carolina to a certain District of Western Territory.'"

sons of mixed blood to the third generation, though one ancestor in each generation may have been a white, shall be excluded from being witnesses except against others of the same class, and that no one of mixed blood in any degree whatever, having been emancipated, shall be witness against a white during twelve months after emancipation. Meigs and Cooper's Code of 1858, §§ 3808, 3809.

**1796.**—Constitution of the State,<sup>1</sup> adopted Feb. 6. In the declaration of rights, only the right of worship is attributed to all men as natural and inalienable. It is declared that "no freeman shall be taken," &c., and, in sec. 26, that "the free-men of this State have a right to keep and bear arms for their common defence." Art. IV. sec. 1, declares that "every free-man"<sup>2</sup> of full age, resident, &c., may vote. This Constitution continued until 1835.

**1799**, c. 5. Directs the seizure and sale of stock belonging to slaves. —, c. 7. Gives power to patrols to arrest slaves and search for arms. —, c. 9. Declares that the willful killing a slave with malice aforethought shall be deemed murder as if the person killed had been free; *proviso*, "this act shall not be extended to any person killing any slave in the act of resistance to his lawful owner or master, or any slave dying under moderate correction." M. & C. §§ 2649–2652.<sup>3</sup> —, c. 28. An act to prevent harboring or trading with slaves, M. & C. §§ 2669–2675; and provides punishment for carrying a forged pass. M. & C. §§ 2614, 2658.

**1801**, c. 27. An act requiring owners who desire to emancipate slaves to apply to the county court for leave and to give security. See act of 1831.

**1803**,<sup>1</sup> c. 13. Forbids, under penalty, uttering, in the pres-

<sup>1</sup> Act of Congress June 1, 1796, for the admission of the State of Tennessee into the Union, extends the laws of the United States to said State. I. Stat. U. S. 491; 2 B. & D. 567.

<sup>2</sup> Held not to extend to free negroes, &c., but only to citizens in the sense of the word in the Constitution of the United States, art. 4, sec. 2, *State v. Claiborne*, 1 Meigs, 340.

<sup>3</sup> An act of 1826, c. 23, sec. 2, declares it murder "unlawfully to kill any reasonable creature in being and under the peace of the State, with malice," &c. Car. & Nich. 316; M. & C. § 4597.



ence of slaves, words of inflammatory character respecting emancipation or encouraging rebellion; also, trading with them and allowing them to assemble. See 1835, c. 44, sec. 3.

**1806**, c. 32, and 1807, c. 100, require free negroes to be registered. M. & C. § 2714. If found wandering about without certificate they may be committed; may be fined for companying with slaves. M. & C. § 2731. By the same acts the ordinary police powers are given to patrols, and justices are authorized to punish slaves by whipping. M. & C. § 2565, &c.

**1812**, c. 88. *An act to prohibit the importation of slaves into this State for the term of five years.* 2 Scott's Dig. 101. An amending act is c. 65 of 1815. The act of 1826, c. 22, is a perpetual act. Persons coming as settlers or residents who had acquired slaves by devise, marriage, or purchase, for their own use, were not prohibited from bringing them. Convicts could not be brought in. Penalty for bringing such, or any free colored person, to sell as slaves. Rep. by 1855, c. 64.

**1813**, c. 56. Makes it an indictable offence to beat or wantonly abuse the slave of another. M. & C. § 2652. — c. 135. Forbids selling liquor to slaves, M. & C. §§ 2676-2680; or slaves selling articles not of their own manufacture, without permit. M. & C. § 2616. By c. 57, of 1835, they cannot be permitted to retail spirits, and forbids the sale by free negroes.

**1815**, c. 138, and 1819, c. 35. Amending c. 24 of 1741, for trial of offences of slaves, not capitally punished, requires three justices and a jury. A single justice, by a later law. M. & C. § 2630. The jury, in slave cases, to be composed of slave-owners. Murder, arson, burglary, rape, and robbery committed by slaves are declared capital. By 1825, c. 24. On the trial of slaves the owner may appear and defend. M. & C. § 2634. 1847, c. 50. Allows appeal from justice's decision to the circuit court. M. & C. § 2641.

<sup>1</sup> The expression, "slaves or other personal property," is used in act of 1805, c. 16, § 2. Act of 1827, c. 61, directs that they shall not be sold by executors without order of court. By c. 156, of 1837, the circuit courts may decree a division of slaves or other personal property.

**1817**, c. 103. In suits for freedom the owner shall give bond to produce the plaintiff; *provided*, a probability of freedom is raised by affidavit or otherwise. M. & C. §§ 3770, 3771.

**1822**, c. 19. Forbidding and declaring void marriages between white persons and colored. M. & C. §§ 4924-4927.

**1823**, c. 57. Forbids, under penalty, the allowing slaves to hire their time. M. & C. §§ 2685-2686.

**1825**, c. 79. Authorizes the sale of negroes who for twelve months have been imprisoned as runaways. M. & C. § 2588. Sec. 3. Authorizes free persons of color immigrating to the State, to have their free papers registered in the courts. M. & C. § 2719. **1843**, c. 129. Permits employment of negroes arrested as runaways, in the improvement of cities or towns. **1852**, c. 97. An act to prevent abuses in taking up slaves as runaways. M. & C. §§ 2581-2598.

**1829**, c. 21. On crimes. By sec. 21, 22, stealing or selling a free person of color for a slave, and stealing a slave, is punishable with imprisonment for not less than five nor more than fifteen years. M. & C. §§ 4621-4625.

**1831**, c. 102. Forbids free persons of color to immigrate under penalty of fine for remaining, and imprisonment in default. M. & C. §§ 2725-2727.<sup>1</sup> An act of 1842, c. 191, allows such immigration under certain conditions. An act of 1846, c. 184, allows free negroes who marry slaves, held in the State, to settle therein. M. & C. § 2712. This act of 1831 also prohibits emancipation except on bond being given to remove the emancipated out of the State. M. & C. §§ 2692-2709. Ch. 81 of 1833 excepts from this those slaves who had already "contracted for their freedom," but the act of 1831 is affirmed by 1849, c. 107.<sup>2</sup>

<sup>1</sup> The State v. Claiborne (1838), 1 Meigs, 331:—whether this was contrary to Art. 4, sec. 2, of Const. U. S.; Green J.:—"The citizens here spoken of are those entitled to *all* the privileges and immunities of citizens. But free negroes, by whatever appellation we may call them, were never in any of the States entitled to *all*," &c., &c.

<sup>2</sup> See Fisher v. Dabbs (1834), 6 Yerger 119, on the history and policy of the State legislation concerning emancipation. Jacob v. Sharp (1838), 1 Meigs, 118, presumption is in favor of freedom in construing testamentary devise.



**1831**, c. 103. Amending the existing slave laws, declares new penalties on slaves assembling; forbids their being allowed to administer medicines; increases the discretion of the courts in cases of conspiracy, &c. M. & C. § 2638. Allows the killing of ringleaders resisting arrest (M. & C. § 2627); with other enactments more efficiently to suppress insurrections, &c.

**1833**, c. 2; 1835, c. 62. Declare penalties on stage or steamboat owners for receiving slaves in stages or boats. M. & C. §§ 2653-2657. —, c. 75. Declares death the penalty for attempt to rape by a negro on a white. M. & C. §§ 2625, 2725.

**1834**.—An amendment of the Constitution, altering the language of sec. 26 of the Bill of Rights to read, "The free *white* men of this State have a right to keep and bear arms," &c., and Art. IV. sec. 1, that "every free *white* man" of full age, resident, &c., may vote. "Provided that no person shall be disqualified from voting in any election, on account of color, who is now by the laws of this State a competent witness in a court of justice against a white man. All freemen of color shall be exempt from military duty in time of peace, and also from paying a free poll tax."

**1835**, c. 19. Gives the Circuit Courts exclusive jurisdiction over slaves in capital cases and amends mode of trial. Am. 1853, c. 88. M. & C. §§ 2629-2645. —, c. 44. Declares it a felony punishable with imprisonment to excite slaves to insurrection, &c., by words or gestures, or to incite others so to do. M. & C. §§ 2682-2684. —, c. 58. Declares it a felony punishable by imprisonment to persuade slaves to leave their masters with design of carrying them from the State, or the harboring them for that end. M. & C. § 2660. —, c. 65. Penalties for giving false passes, harboring runaways, &c. M. & C. §§ 2658, 2659.

The acts above cited may be found in Carruthers and

<sup>1</sup> By Art. II. sec. 31, "The General Assembly shall have no power to pass laws for emancipation of slaves without the consent of their owners."

Nicholson's Compilation, ed. 1836, or in Haywood and Cobb's Digest, ed. 1831, or in Scott's Digest of 1821.

**1839**, c. 47. *An act to prohibit the practice of permitting slaves to act as if they were free.* Nicholson's Digest of 1846.

**1852**, c. 160. The acts requiring security from resident free negroes are not to be construed to require any free negro born in the State to give bond unless he becomes disorderly. —, c. 174. Declares slave or free negro administering poison shall be capitally punished. M. & C. §§ 2625, 2725. —, c. 158. Authorizes the courts to find out indigent free colored children. Ib. § 2720.

**1854**, c. 50. *An act to regulate the emancipation of slaves and to provide for the transportation of free colored persons to the western coast of Africa.* Where no private fund has been provided for the expense, a fund for the purpose is to be accumulated by hiring out the emancipated slaves under the direction of the County Court. Free negroes who fail to give bonds for good behavior as required by law are placed within the operation of this act. M. & C. §§ 2692-2709.<sup>1</sup>

**1855**, c. 64. Repeals so much of the act of 1826 "as relates to the importation of slaves into this State for the purpose of selling or disposing of them as articles of merchandise." In the Code of 1858, only the importation of convict slaves is prohibited. M. & C. § 2565.

**1855-6**, c. 72, sec. 3, 4. Forbids free negroes to peddle, or barter market stuffs. M. & C. § 2729. 1857-8, c. 131, sec. 18. Obliges them to work on the roads "as other hands in said road districts."

**1857**, c. 45. *An act providing for the voluntary enslavement of free persons of color in this State.* Allows any such person of the age of eighteen years to choose a master "and convey him or herself into slavery." Provides for an inquiry by a court, &c., not to affect children of such negro then born. M. & C. §§ 2737-2745.

<sup>1</sup>The Code of 1858, M. & C. §§ 5343, 5344, authorize the governor to issue a warrant for the apprehension and extradition of fugitives from justice from other States. This appears to be the earliest act of the State to this effect.



## § 557. LEGISLATION OF THE STATE OF SOUTH CAROLINA.

**1778**, March 19. Constitution of the State,<sup>1</sup> contains no general attribution of any rights as natural. Sec. 41 declares that "no freeman" be taken, &c. 12. Limits the franchise to free white persons.

**1787**.—*An ordinance to impose a penalty on any person who shall import into this State any negroes contrary to the installment act.* 7 Statute L. 430.

**1788**.—An act relating to the detention of runaways. Ibid. 430.

**1790**, June 3. Constitution of the State. Art. I. sec. 1, elective franchise as before.<sup>2</sup> Art. IX. a Bill of Rights, sec. 1, declaring "all power is originally vested in the people." 2. "No freeman shall," &c. 6. That trial by jury as heretofore used, and liberty of the press, shall be inviolably preserved.

**1792**.—*An act to prohibit the importation of slaves from Africa or other places beyond the sea into this State; and also to prohibit the importation or bringing in slaves or negroes, mulattoes, Indians, Moors, or mestizoes bound for a term of years from any of the United States by land or by water.* Ibid. 431. An exception is made in the case of actual settlers bringing their slaves, citizens acquiring slaves in other States, slaves of travelers, &c. This act revised and extended by an act of 1794, *ibid.* 433, until Jan. 1, 1797.

**1796**.—An act to prohibit the importation of negroes until the first day of January, 1797. Ibid, 434. This was extended to the 15th Jan., 1801, and afterwards to 1803. Ibid. 435, 436. These statutes were repealed in 1803. —. An act against dealing with slaves, &c. Ibid. 434.

**1800**.—*An act to prevent negro slaves and other persons of color from being brought into or entering this State.* Ibid. 436. Sec. 1, forbids the importation of slaves, with the exceptions already made, and makes it unlawful "for any free negro, mu-

<sup>1</sup> In this Constitution, the Constitution or frame of government established by a Provincial Congress, March 26, 1776, is herein referred to as intended only for temporary purposes.

<sup>2</sup> By Art. I. sec. 6, the possession of "ten negroes," is among the alternative requisites for eligibility to the State House of Representatives.

latto, or mestizo," to enter the State. This was enacted for three years, but declared perpetual in 1803. Ibid. 450. (A supplementary act with more stringent provisions was enacted in 1801. Ibid. 444. Modified in 1802, in favor of persons removing into the State. Ibid. 447.) —. *An act respecting slaves,*<sup>1</sup> &c. Ibid. 440. Sec. 1, provides for dispersing negro assemblies, by patrols and others, for employment of white overseers. 7-9. Requires emancipation to be by deed, after examination by magistrate and freeholders of slave's character and ability for self-support; recites the practice of emancipating infirm, aged, and depraved slaves. Sec. 1 is modified by an act of 1803, ibid. 448, so that, without a warrant, no person may, before nine of the evening, "break into any place of meeting wherein shall be assembled the members of any religious society of this State, *provided* a majority of them shall be white persons, or otherwise disturb their devotions."

**1803.**—An act repealing and amending former acts on the importation of slaves. Ib. 449. Prohibits the importation of negroes, &c., bond or free, from Bahama, or the West Indies or South America, and from the "sister States," unless with a certificate of good character; declares forfeiture of negroes, free or bond, sent or entering into the State contrary to this act. The acts of 1800, 1801, against the importation of slaves generally, are declared perpetual.

**1816.**—*An act to prohibit the importation of slaves into this State from any of the United States, &c.* Ibid. 451, the only exception is in favor of travelers with not more than two slaves, or settlers traveling to other States, having certificates of the number, &c., of their slaves. An act of 1817, ib. 455, contains additional provisions. These acts are repealed by an act of Dec. 16, 1818. Ibid. 458.

<sup>1</sup> White v. Chambers (1796), 2 Bay. 70, *Caption*:—"Battery of a slave is actionable by the master, though the slave himself can maintain no such action. If a slave is insolent to a freeman he ought, in the first place, to complain to the master or other person having charge of such negro slave, who ought to give him redress. But if the master or person having charge of such slave refuse redress, then application should be made to a civil magistrate, who was bound to redress the injury. But he ought not to take revenge by his own arm."



**1817.**—Another act against trading with slaves. Ib. 454.

**1820.**—*An act to restrain the emancipation of slaves and to prevent free persons of color from entering into this State.* Ib. 459. Sec. 1 enacts that slaves shall be emancipated by act of the Legislature only. 2. Forbids entry of free blacks, who, on remaining fifteen days after order to leave (unless in cases of shipwreck, &c., or being seamen on vessels which are to depart, or the servants of travelers), shall be fined and sold in default. 6. Declares the circulation of written or printed papers, "with intent to disturb the security of the State in respect to the slaves," a high misdemeanor, and provides punishment.

**1821.**—*An act to increase the punishment inflicted on persons convicted of murdering any slave, &c.* 6 Stat. at L. 158. That if any person "shall willfully, maliciously, and deliberately murder any slave within this State, such person, on conviction, shall suffer death without benefit of clergy." That if any "shall kill any slave on sudden heat and passion," such person, on conviction, shall be fined in a sum not to exceed five hundred dollars, and be imprisoned not exceeding six months." —. Act providing new penalties for harboring slaves. 7 Stat. 460.

**1822.**—*An act for the better regulation and government of free negroes, &c.*<sup>2</sup> Ib. 461. Sec. 1. That free negroes leaving the State shall not return. 2. A tax on free negroes, &c. 3-5. Against landing free negroes. 6. Against slaves hiring out their time. 7. Free negroes to have guardians. (See law of 1860.) 8. Counseling blacks to rebel declared felony, punishable with death. This act and that of 1820 are modified or comprehended in the act of,

**1823.**—*An act more effectually to prohibit free negroes, &c.* Ib. 463, which provides for the imprisonment of colored seamen, &c., during the stay of the vessel in port, and provides for a fine on masters of vessels bringing such.<sup>3</sup> This is not to

<sup>1</sup> This is a different offence from manslaughter at common law. *State v. Rains*, 3 McCord, 583. See the act of 1740.

<sup>2</sup> *Groning v. Devana* (1831), 2 Bayley, 192. A free person of color is not a competent witness in any case in the courts of record, although both parties to the suit are of the same class with himself; nor can book entries made by a free negro be received in evidence on the oath of a white to his handwriting.

<sup>3</sup> See 1 Op. U. S. Atty. Gen. 817, opinion of J. M. Berrien that this law of South

apply to "free American Indians, free Moors, or Lascars, or other colored subjects of countries beyond the Cape of Good Hope," nor to vessels of war. Sec. 6. Makes it unlawful to bring back to the State any slave who may have been carried to the West Indies, Mexico, South America, Europe, any sister State north of the Potomac, or to the city of Washington.<sup>1</sup>

By additional act of 1825, *ib.* 466, vessels bringing such may be obliged to remove from the wharf and discharge and load by lighters. Free negroes are not to carry firearms or be employed as pioneers. This and earlier acts on the subject are repealed or comprehended in the fuller provisions of an act of 1835, Dec. 19, with this title, *ibid.* 470, which again is modified as to Cuba by law of 1847, 11 St. at L. p. 438, and as to ports on the Chesapeake, by law of 1848, *ib.* p. 511.

**1831.**—An act relating to slaves, &c. *Ib.* 467. Against negroes manufacturing or selling spirits, and establishing distinctions in punishment of blacks for torts.

**1834.**—*An act to amend*, &c. *Ib.* 467. Sec. 1. Prohibits teaching slaves to read or write, under penalties. 2. Prohibits employing a colored person "as clerk or salesman in any shop, store, or house used for trading." 3-5. New penalties for selling spirits to slaves. 6. Against gambling with slaves.

**1839, c. 7.** *An act concerning the office and duties of magistrates.* Sec. 23. Enacts that all offences committed by a slave or free person of color, shall be tried before a magistrate and five freeholders.<sup>2</sup> —, c. 13. A new patrol act, contains the usual grants of power in respect to slaves and free negroes.

Carolina is not in conflict with the treaty between the United States and Great Britain. W. W. Story, in *Life of Judge Story*, vol. 2, p. 515, speaking of Mr. Hoar's object in visiting Charleston in 1844-5:—"This law, though it had already been pronounced unconstitutional by the circuit court of the United States sitting at Charleston and so certified to the executive at Washington, still continued in force." But *qu.* if the opinion was not on the *State* circuit, by Judge Johnson?

<sup>1</sup> *State v. Simons*, 2 Speers, 761, that the law of 1835 forfeiting slaves on their return, who may have been carried north of the Potomac, not being sanctioned by law existing at the adoption of the State Constitution, and not proceeding by trial by jury is, so far, unconstitutional.

<sup>2</sup> See in *The State v. Nicholas* (1847), 2 Strobhart, 278, the account of the previous law of courts of this class. *Eden v. Legare* (1791), 1 Bay. 171; *King v. Wood* (1818), 1 Nott & McCord, 184, calling one a mulatto is actionable *per se* in this State. Whether one is a person of color is to be decided by a jury; inspec-



**1841.**—*An act to prevent the citizens of New York from carrying slaves or persons held to service out of this State, and to prevent the escape of persons charged with the commission of any crime.* 11 St., p. 149. Provides for inspection of vessels owned in New York, and not navigated by a citizen of South Carolina. Additional is an act of 1842, ib. p. 219.

— *An act to prevent the emancipation of slaves, and for other purposes.* Ib. p. 152. Declares void all testamentary emancipations and deeds of trust for that end. — *An act to make the unlawful whipping or beating of a slave an indictable offence.* Ib. p. 153.

**1843.**—*An act to increase the penalty for concealing or conveying away any slave accused of a capital crime.* Ib. 257.

— *An act declaring rape by a slave on a white to be capitally punishable.* Ib. 258. Another amending patrol law. Ib. 258. — *An act to provide compensation to owners of slaves executed.* Ib. 264.

**1844.**—*An act to provide for the punishment of persons disturbing the peace of this State in relation to slaves and free persons of color.* Ib. p. 292. Sec. 1 provides for banishment, with fine and imprisonment, of any who may come within the State "for the purpose or with an intent to disturb, counteract, or hinder the operation of such laws and regulations as have been or shall be made by the public authorities of this State in relation to slaves or free persons of color." 2. Provides for the punishment of residents who may accept authority from any other State or foreign power, and commit any overt act with the like purpose, &c. 3-5. Governor shall require persons who may come with the above intent to depart, and provides for the punishment, &c., in case of remaining. — *An act amending the law of 1835, to prevent free negroes entering the State,* ib. 293. Declares that negroes so entering shall not be entitled to habeas corpus.

**1849.**—*An act amending the slave code of 1822, forbids slaves being allowed to hire their time.* Ib. 578.

tion, reputation of parentage, and station in society. *State v. Davis*, 2 Bailey, 558; *State v. Cantey*, 2 Hill, 614.

**1856.**—Amending the act of 1835, to prevent free negroes, &c., from entering the State, &c. Sec. 1, exempts vessels driven in by stress of weather, &c. 2-4. Bonds, in ordinary cases, to be given that negroes shall remain on board, and comply with regulations of the port. Duty of Sheriff, &c. 12 Stat. at Large, p. 574. —. *An act to amend "an act for the better ordering and governing negroes and other slaves in this province,"* &c., the act of 1740; alters the thirty-eighth section, by providing for trial of persons violating its provisions by indictment in Court of Sessions, with right of appeal, &c. Ib. p. 593.

**1857.**—*An act to amend the law in relation to trading with slaves.* 1. Provides punishment by whipping on conviction of second offence. 2. That free negro delivering liquor to slave shall be punishable by whipping. Ib. p. 615.

**1858.**—An act to amend Sec. 37 of the act of 1740, by enacting "that if any person, being the owner of any slave, or having the care, management, or control of any slave, shall inflict on such slave any cruel or unusual punishment, such person, on conviction thereof under indictment, shall be fined and imprisoned at the discretion of the Court. *Provided, however,* that nothing herein contained shall be so construed as to prevent the owner or person having charge of any slave from inflicting on such slave such punishment as may be necessary for the good government of the same." Ib. p. 738.<sup>1</sup>

**1860.**<sup>2</sup>—Enactments, in the early part of this year, placing free negroes under a closer guardianship, requiring them to wear badges engraved with their name, occupation, and a particular number, with new penalties under liability to be sold for slaves, are reported in the public journals.

<sup>1</sup> By an act of 1859, provision is made for compiling a code of the Statute Law. There appears to be no statute of the State empowering the Executive to deliver up persons demanded as fugitives from justice from other States. Persons may be arrested by a justice in prospect of such demand. *State v. Anderson*, 1 Hill, 327.

<sup>2</sup> Dec. 20, 1860. A Convention, elected pursuant to a call of the Legislature, pass, by unanimous vote, *An ordinance to dissolve the union between the State of South Carolina and other States united with her under the compact entitled the Constitution of the United States of America.*

## § 558. LEGISLATION OF THE STATE OF GEORGIA.

**1777**, Feb. 5. The first Constitution of the State; which was replaced by another in 1789.

**1792**.—*An act to protect religious societies in the exercise of their religious duties.* Sec. 2. "No congregation or company of negroes shall under pretence of religious worship assemble themselves contrary to the act for regulating patrol." Cobb's New Digest, 982.

**1793**.—An act of this year, of which sec. 1, prohibiting the importation of slaves, is not given in the Digests by notice as "re-enacted by the Constitution." (*Viz.* art. IV. sec. 11.) Sec. 2. "Refers to free persons coming into this State. Repealed by acts of 1801 and 1808." 3. Declaring that the State will not in any instance pay for slaves executed. 4. In prosecutions for capital crimes, the State is to pay; in those for less heinous, the owner. Cobb's Digest, 982.

**1796**.—*An act for the government of servants, not slaves, imported or migrating into this State*, recites that the encouragement migration of whites inhabitants is of primary consequence; that in these cases disputes arise on the contract for transport; provides for settling the time, &c. Cobb's D. 961.

**1798**, May 30. A new Constitution. It contains no general attribution of rights as in the ordinary bills of rights. By art. IV. sec. 1, the electors are required to be "citizens and inhabitants of this State," but no distinction of color is mentioned.<sup>1</sup> In sec. 11 it is provided that "there shall be no importation of slaves into this State from Africa or any foreign place after the first of October next."

<sup>1</sup> I have not seen the earlier Constitutions. They probably were like the third in these particulars.

<sup>2</sup> This provision appears to have operated without any act of legislation to carry it into effect. In the same section it is provided:—"The legislature shall have no power to pass laws for the emancipation of slaves without the consent of each of their respective owners previous to such emancipation. They shall have no power to prevent immigrants from either of the United States to this State from bringing with them such persons as may be deemed slaves by the laws of any one of the United States." Sec. 12 provides, "Any person who shall maliciously dismember or deprive a slave of life shall suffer such punishment as would be inflicted in case the like offence had been committed on a free white person, and on the like proof, except in case of insurrection by such slave, and unless such death should happen by accident in giving such slave moderate correction." This might well be taken to act as private law, but an act was passed Dec. 2, 1799, to carry it into effect.



**1801.**—*An act prescribing the mode of manumitting slaves in this State.* Sec 1. Requires an application to the legislature. 2. Declares penalty of two hundred dollars for attempting to manumit, and the act void. 3. Forbids the record of deeds, &c., of manumission. This section extended to wills, by an act of 1815, 1818, sec. 2. Cobb's D. 983.

**1803.**—An act to amend the act of 1770, which is the principal law. Prohibits trading with slaves. See Penal Code of 1833, Rev. 13, § 13. Forbids owners to permit slaves to labor for themselves, except in certain principal towns. An act of 1806 increases the stringency of the law requiring patrol duty. Cobb's D. 983, 984. See law of 1830.

**1808.**—An act reciting, "Whereas the permitting of free negroes and persons of color to rove about the country in idleness and dissipation has a dangerous tendency;" provides for binding out to service male free negroes being minors. Cobb's D. 985.

**1810.**—An act, the title of which is not given in the Digests, wherein the first six sections are not given, being superseded by the act of 1818. Sec. 7. Provides that free persons of color on their written application may have guardians appointed for them, having the same powers as guardians of the persons and estates of infants. An act of 1829 relates to this subject.

**1811.**—An act authorizing summary trial of slaves by justices of the peace for offences not capitally punishable; in these the trial to be by the inferior county court with a jury. By an act of 1815, this act is extended to free persons of color. Another, in 1816, declares what offences shall be capital; and that any free negro for enticing a slave to escape or leave the State shall be imprisoned for one year, and then sold as a slave for life. Other offences made punishable at the discretion of the court, not extending to life or limb. An act of 1817, takes away the governor's power to commute the sentence. An act of 1821 further defines capital offences. Amendments in 1829, 1837. Cobb's D. 1012.

**1815.**—*An act to compel owners of old and infirm slaves to maintain them.* Cobb's D. 987.



**1816 and 1818.**—Acts forbidding to buy of slaves, not having a ticket from the owner, any produce or articles except certain things enumerated as commonly manufactured by them for their own use. Forbids also selling to slaves. Colored persons violating this act are punishable by whipping. Penal Code 1833, Div. 13, § 13; Cobb's D. 827.

**1816.**—A penal code. Div. 5, sec. 17. "Killing a slave in the act of revolt, or when said slave resists legal arrest, shall be justifiable homicide." 18. "In all cases the killing or maiming a slave or person of color shall be put upon the same footing of criminality as the killing or maiming a white man or citizen." Lamar's Compil. pp. 568, 616, (Code of 1833, Div. 4, sec. 18; Cobb's D. 785.) Div. 7, sec. 32, 34. Against stealing and removing slaves. Div. 12, sec. 33. Bringing in slaves from other States, except by immigrants, declared a misdemeanor. (This appears to be the first prohibition. It was repealed in 1824; revived in 1829; modified in 1836; again repealed 1841; revived again 1842. By 1849-50, sec. 176, it was again repealed and all offenders relieved from prior transgressions. Cobb's Dig. 1001, *note*.) Sec. 34-37. Punishment for harboring, &c., for beating &c., slaves, by any but the master; owners punishable for cruelty, on indictment, by fine and imprisonment. See Lamar's Compil. By an act of 1817, if a slave, under the coercion of one who exercises authority over him, commits a crime not punishable with death if committed by a white, the person who so compelled him shall be punished. Ibid. p. 612.

**1817.**—*An act for disposing of any negro, &c., brought into the State contrary to the act of Congress prohibiting the importation of slaves after 1st January, 1808.* Provides that the Governor may demand and receive such negroes and may sell them unless the colonization society will undertake to pay expenses and transport them to Africa. Cobb's D. 988. An act of 1818, recites, Whereas, numbers of African slaves have been illegally introduced, &c., provides for compensation of persons seizing such slaves. Ib. 994.

**1818.**—An act amending the law of 1801 on manumissions,

to prevent immigration of free colored persons and regulate those resident in the State. Recites "Whereas the principles of sound policy, considered in reference to the free citizens of this State, and the exercise of humanity, towards the slave population within the same, imperiously require that the number of free persons of color within this State should not be increased by manumission or by the admission of such persons from other States to reside therein," &c., &c.<sup>1</sup> Sec. 1, 2, 4, confirm the act against manumission and increase the penalty. (See act of 1801.) 3. That no free person of color (seamen excepted) shall come, under penalty of \$100, and being sold on failure to pay. (But see act of 1824.) 5-11. Require free colored persons to be registered; make them liable to do public work; forbid their holding real estate, or any slaves. (An act of 1819 repeals this provision as to real estate, except for Savannah, Augusta, and Darien.) Cobb's D. 989-995.

**1823.**—An act requiring the presence of a white overseer on each plantation having ten or more grown-up slaves. Cobb's D. 996.

**1824.**—*An act to repeal all laws or parts of laws which authorize the selling into slavery of free persons of color.* Ib.

**1826.**—An act amending the law of manumission, and to prevent the inveigling and illegal carryiny out of the State persons of color. Sec. 1, 2, 3. Requiring new precautions in registering negroes as free, &c. 4. Makes masters of vessels and others liable to a fine for carrying out of the State any free negro without certificate of registry. 6. Colored seamen, except those arriving from ports in South Carolina, shall not leave their vessels during the night, and declares the duty of the masters. Another act, in 1827, requires them under pen-

<sup>1</sup> It is held that a deed requiring the grantee to pay "each of the slaves (conveyed) two dollars per month during their natural lives" is not void under this act. *Spalding v. Grigg*, 4 Geo. R. 76. A will requiring the executors to remove certain negroes without the State for the purpose of manumission is not void under this act. *Vance v. Crawford*. Ib. 448. A will prescribing that certain negroes "should be made to live comfortable under the superintendence of A and B, into whose care and under whose protection I do hereby give and place them, in view of their being treated with humanity and justice, subject to the laws made and provided in such cases," is held void. *Robinson v. King*, 6 Geo. R. 539.

alty to report all colored persons on board. Cobb's D. 997, 998. These seem superseded by the act of,

**1829.**—An act to amend the Quarantine Laws and "*to prevent the circulation of written or printed papers within this State calculated to excite disaffection among the colored people of this State, and to prevent said people from being taught to read or write,*" and to repeal the act of 1824 which repeals the law of 1817, prohibiting the introduction of slaves into this State. By sec. 1, vessels having free persons of color on board are made subject to quarantine of 40 days. 2, 3. Free persons of color punishable for communicating with such. 4. Captains bound to carry away such persons. 5. If not carried by the ship, such person shall leave the State in ten days. 6. Cases of shipwreck or distress excepted. 7. Not "*to extend to any free American Indian, free Moors, Lascars, or other colored subjects of the countries beyond the Cape of Good Hope who may arrive in this State in any merchant vessel; but such persons only shall be deemed and adjudged to be persons of color within the meaning of this act as shall be descended from negroes or mulattoes either on the father's or the mother's side.*" 9. City councils and corporations required to carry this into effect. 10. Any person circulating pamphlets to incite insurrection, to be punished with death. 11. Any person teaching slaves or free persons of color to read or write, to be punished: if a person of color, by fine or whipping; if a white, by fine or imprisonment. Cobb's D. 1001. Sec. 10, 11, are in the penal code of 1833, Div. 13, sec. 18, 19. Ib. 829.

**1829.**—Two acts defining arson by slaves, &c., and amending the law of trials. Cobb's D. 1002. —. *An act to prohibit the employment of slaves and free persons of color in the setting of types in printing offices in this State.* Code of 1833. Div. 13, sec. 19. Ib. 828.

**1830.**—An act enabling justices to organize the patrols. An act of 1839 requires precision in permits to slaves. An act of 1845 requires patrols to visit at intervals of fifteen days. Cobb's D. 1017.

**1832.**—An act authorizing the sale of negroes who have



been confined and advertised as runaways, as therein prescribed. An act of 1850 as to advertisements. Cobb's D. 1018.

**1833.**—Respecting free persons of color. None may give credit to free colored persons, without order from the guardian. If insolvent, they may be bound out. Neither free nor slave may preach or exhort assemblies of more than seven, unless licensed by justices on certificate of three ordained ministers. They are forbidden to carry fire-arms. Cobb's D. 1005.

**1833.**—Penal code, Div. 13. Offences relative to slaves. Sec. 1. Prescribes penalties for bringing slaves into the State; excepts residents and immigrants; requires them to file notice. 5. Travelers allowed to bring their slaves; prize slaves may be brought in, but not sold. 6. Fine for receiving slaves illegally imported. 7. Parents in other States may hire or loan slaves to their children here. (These sections repealed by the law of 1849.) 9. Against harboring, &c., slaves. (An act of 1835 makes free negroes punishable for this offence, as slaves are; act of 1838 ascertains the punishment.) 10. The carrying out of the State or a county of a slave without owner's consent, "and without any intention or design on the part of the offender to sell or otherwise appropriate the said slave to his own use, or to deprive the owner of his property in said slave," declared a misdemeanor punishable by fine and imprisonment. Other sections re-enact existing provisions. See Cobb's D. 826.

**1835.**—*An act more effectually to protect free persons of color, and to point out the mode of trying the right of freedom.* Recites, "Whereas free persons of color are liable to be taken and held fraudulently and illegally in a state of slavery, by wicked white men," &c., provides for trial of the right of freedom before a judge of the county court and a jury, on complaint of a person of color, if, "upon examination, the justice shall be satisfied that there is probable ground to believe that such complainant or complainants are improperly and illegally held in a state of slavery." An amending act of 1837 directs the trial to be had of course, on affidavit by some white person being filed. — An act, amending the law of 1770, makes free colored persons punishable like slaves for harboring, &c.,



and gives authority to constables to search houses of such on suspicion. Another amending act specifies what evidence shall entitle to registry as free colored persons, and that no persons of color, other than registered and slaves, may remain in the State. Registered persons, by removing, lose their right and cannot return. Persons claiming to own any who are not registered shall make oath. Sec. 5. Forbids the return to the State of any slave who may have been "in any State usually known as a non-slaveholding State, or in any foreign country." Such, on returning or being brought back, shall be seized and sold; those bringing them back liable to fine and imprisonment as for a misdemeanor.<sup>1</sup> 7. "The provisions, prohibitions, and penalties of this act shall not extend to any American Indian, free Moor, or Lascar, but the burden of proof, in all cases of arrest of any person of color, shall be on such person of color, to show himself or herself exempt from the operations of this act." 8. The inferior courts may deny to any free person of color, being of bad character, the registration of his name, and he shall be deemed a free person of color within the State in violation of its laws, and liable, &c. An act of 1845 relieves from penalties incurred under these acts. Cobb's Dig. 1017.<sup>2</sup> —. An act to prevent the employment of slaves and free negroes in druggists' stores, and requiring poisonous drugs to be kept under lock and key. Ib. 1010.

1837.—An act against slaves being allowed to hire their time. (An act of 1845 prohibits slaves and free colored persons being mechanics or masons; from making contracts to build or repair houses. Cobb's Dig. 829.) —. An act to punish whites gambling with negroes. Others in 1838, 1847. Ib. 829, 831. —. An act amending the laws regulating the trial of slaves. Ib. 1012. An act of 1850 places the trials of slaves and free negroes for capital offences on the same basis with those of others. Ibid. 1018.

<sup>1</sup> No exception in the case of fugitive slaves is mentioned.

<sup>2</sup> *Cooper v. Mayor, &c.*, Savannah (1848), 4 Geo. 68, held that free persons of color are not citizens, as contemplated by the Constitution and laws of this State. *Bryan v. Walton* (1853), 14 Geo. 185-207, showing the nature of the relation between the free negro and his guardian. The opinion of the court, Lumpkin,

**1841.**—*An act the better to secure the citizens of Georgia in the possession of their slaves.* Recites, "Whereas much injury has resulted to the people of Georgia in consequence of abduction, &c., requires bonds to indemnify from all owners or charterers of vessels sailing from Georgia. Steamboats plying to slaveholding States excepted. No forfeiture of bond if a concealed slave be returned. Cobb's Dig. 1013. —. An act prohibiting the sale of stationery to slaves or free persons of color. Ib. 830.

**1842, 1850.**—Acts relating to the apprehension of runaways by private persons; the reward; and requiring their delivery to a jailer. Cobb's Dig. 1016, 1019. An act forbidding slaves being carried on railroads, except as therein provided. Ib. 399.

**1849, 1850.**—An act removing all restriction on the importation of slaves, and requiring corporations of towns to establish marts for their sale. Cobb's Dig. 1018. The leading section of this act was repealed by act of Jan. 22, 1852, An. L. p. 263, and this act again repealed by act of March 4, 1856, An. L. p. 271, and the act of 1849 revived. Those of the laws above cited which were in force in 1851 may be found in Cobb's Dig. of that year, Titles, *Penal Laws, Servants, Slaves, Patrols, and Free Persons of color.*<sup>1</sup>

**1851.**—An act amending the penal code—Div. 13, sec. 12—against cruel treatment of slaves, inserts "overseers," and "beating, cutting, or wounding, or by cruelly and unnecessarily biting or tearing with dogs."

**1854.**—A new act against trading with slaves and furnishing them with liquors. An. L. p. 84. —. An act amending the patrol law. Ib. 101. —. *An act to regulate the sale and division of slaves in certain cases therein named.* Ib. 103.

J., in view of the question of negro citizenship, and the later opinions in Dred Scott's case, has great interest. The judge asserts that the condition of the free negro in any State is, and must, from his own characteristics, be worse for himself than slavery; that the policy preventing manumission is humane.

<sup>1</sup> Cobb's Dig. p. 1020, notes the titles of various resolutions and reports of the legislature on questions relating to slavery. Among these, a report, Dec. 25th, 1837, "in reference to the refusal of the governor of Maine to deliver up certain persons charged with stealing and carrying away a negro slave from the city of



Sec. 1. That mother and child under five years are not separable, "unless the division of the estate cannot in any wise be effected without such separation." Two acts on registry of free negroes. *Ib.* 104, 105; and *An act to authorize the justices of the inferior courts of this State to bind out any free negro, &c., between the ages of five and twenty-one years.* —. An act repealing the quarantine on colored seamen coming by sea, and substituting passports for them when reported by captains. This not required in case of vessels from ports in South Carolina and Florida. *Ib.*<sup>1</sup>

1859.—*An act to prohibit the post-mortem manumission of slaves.* An. L. 68. Declares "any and every clause in any deed, will, or other instrument made for the purpose of conferring freedom on slaves directly or indirectly, within or without the State, to take effect after the death of the owner, shall be absolutely null and void." —. *An act to prevent free persons of color, commonly known as free negroes, from being brought or coming into the State of Georgia.* *Ib.* 68. Provides for the sale into slavery of those who may come, and for the punishment of those who may bring them. Declared not to modify the laws relative to colored seamen. —. *An act to define and punish vagrancy in free persons of color, and for other purposes.* *Ib.* 69. Provides for sale of vagrant colored persons.

Savannah, showing the evasion and subterfuge resorted to by the governor, and deprecating the ultimate result of such conduct, if persisted in." The committee, though disposed to recommend a quarantine on all vessels from Maine, viewing abolition "as a moral and political pestilence," recommended a renewal of the demand on the governor, and, in case of refusal by him and the legislature of Maine to redress the grievance, the governor of Georgia was required to call a convention "to take into consideration the state of the Commonwealth of Georgia and to devise the course of her future policy."

<sup>1</sup> An act of 1857, Ann. L. p. 15, reciting the inconvenience to planters and landholders from non-resident fishermen, hunters, and duckers, "who destroy the game, as well as hold improper intercourse with the slaves"—forbids non-residents hunting, &c., under penalty of fine and imprisonment. Landholders may permit such on their own lands.

<sup>2</sup> This act seems passed in view of the doctrines of Judge Lumpkin, in *Cleland v. Waters* (1855), 19 Geo. 35. "Slavery is a cherished institution in Georgia—founded in the Constitution and laws of the United States, in her own," &c. \* \* "The Scripture basis on which slavery rests," &c. *Ib.* 43.

There seems to be no authority given by special statute of the State to the executive of Georgia to deliver up fugitives from justice.

## CHAPTER XVIII.

THE LOCAL MUNICIPAL LAWS OF THE UNITED STATES, AFFECTING  
CONDITIONS OF FREEDOM AND ITS CONTRARIES. THE SUBJECT  
CONTINUED. LEGISLATION IN THE STATES OHIO, INDIANA,  
ILLINOIS, MICHIGAN, WISCONSIN, MISSISSIPPI AND ALABAMA,  
FORMED IN TERRITORY CEDED BY THE ORIGINAL STATES.

### § 559. LEGISLATION OF THE STATE OF OHIO.

In the second article of the provisional treaty of November 2, 1782, and the definitive treaty of September 3, 1783, with Great Britain, the River Mississippi, to the 31st degree north latitude, was declared the western boundary of the United States.<sup>1</sup> The States Massachusetts, Connecticut, New York and Virginia, severally claimed either the whole or large portions of the land west of the present limits of the original thirteen States, bounded on the south by the River Ohio and on the north by the great lakes.<sup>2</sup>

<sup>1</sup> VIII. U. S. Stat. 55, 57.

<sup>2</sup> The claims of New York, extending over all lands south and west of the lakes, were founded on accession by conquest to the rights of the Six Nations of Indians. Those of Virginia were based on the terms of the colonial patents and charters, and thereby limited on the south only, by the parallel 35° 30', the southern line of Virginia and Kentucky. Those of Massachusetts rested on her patents, &c., extending between the prolonged lines of her northern and southern boundaries, westward beyond the proper western boundary of New York. The claim of Connecticut extended in like manner westward, bounded north by the prolonged southern boundary of Massachusetts, and was founded on her charters.

In recent arguments against the power of Congress to prohibit slavery in the present Territories of the United States, it is very commonly assumed that the whole territory northwest of the Ohio was at the date of these cessions unanimously recognized as part of the soil of Virginia. On this issue, see particularly



The sovereignty and jurisdiction actually vested in these several claimants was finally ceded to the United States, and accepted by their representative, the Congress of the Confederation.<sup>1</sup> If the laws of any of the States making the cession had territorial extent within the country thus ceded, those laws would, after the change of sovereignty, still have been operative, on the principle of the continuation of law,<sup>2</sup> until changed by the new possessor of sovereign legislative power. The laws of these States in respect to personal condition at the time of the transfer of their dominion have been exhibited. If the condition of negro slavery was at this time prohibited within the State of Massachusetts, the question might still have been raised whether the law attributing rights inconsistent with such slavery had been promulgated as a law for the State as now bounded, or had the character of a universal principle in its jurisprudence which must have been judicially applied wherever the State might have territorial dominion.

the report of the Committee of Congress, May 1, 1782; Journals of Cong. VII. 360-367; and a report in legislature of Maryland, with resolutions, March 9, 1841. Sess. Laws of Maryland.

<sup>1</sup> The Articles of Confederation were dated July 9, 1778. Maryland acceded last, March 1, 1781. The Congress, Oct. 10, 1780, *Resolved*, "That the unappropriated lands that may be ceded or relinquished to the United States by any particular State, pursuant to the recommendation of Congress on the sixth of September last, shall be disposed of for the common benefit of the United States and be settled and formed into distinct republican States, which shall become members of the federal Union and have the same rights of sovereignty, freedom, and independence as the other States; that each State which shall be so formed shall contain a suitable extent of territory, not less than one hundred, nor more than one hundred and fifty miles square, or as near thereto as circumstances will admit," &c. The final cession of the claims of New York was made Oct. 21, 1782; the cession by Virginia, March 1, 1784; that by Massachusetts, April 19, 1785; that by Connecticut, Sept. 14, 1786, with the reservation of a tract afterwards known as the Western Reserve, the jurisdiction over which was afterwards, under the Constitution, May 30, 1800, also ceded to Congress. For the various resolutions and acts of Congress and of the several States relating to the title of the United States to the territory not organized under a State government at the formation of the Constitution, see chapters 30 and 31 of 1 Bioren & Duane's Laws, p. 452, &c., extracted from the Introduction to the volume of land laws, compiled in virtue of a resolution of Congress of April 27, 1810, showing the geographical limits of the lands claimed by the several States under their charters, and from collections of laws of the United States relating to public lands made under a resolution of the House of Representatives, March 1, 1826, and order Feb. 19, 1827, and published by Gales & Seaton, 1828. See the Virginia Documents in 10 Hen. St. 548. For the earlier treaties with Indian tribes, see also 1 B. & D. For the political history of these cessions, see 3 Hildreth's Hist. 398, 426; 1 Curtis' Hist. of the Const. B. 1, ch. 5; Story's Comm. §§ 227, 228.

<sup>2</sup> *Ante*, Vol. I. p. 114.

It may, however, be assumed that the law prevailing in the ceded territory was not determined by the legislative power of any of the ceding States, but was such as it would have been if at the Revolution it had been a separate dependency of the British crown. The common law of England would have had, under that sovereignty, personal extent in determining the relations of the white colonist, if there was no other law there prevailing with territorial extent. The country had been claimed by France as comprehended in Louisiana and Canada. French colonists were the first Europeans who established themselves within its limits. The common law of France appears to have had a personal extent there, though it was not regarded as having obtained that territorial extent which would have made it the law of the land, a law which would have continued to bind all persons until changed by the new sovereign. It does not appear that the French law was ever abrogated by special statute while the country was included within the British Empire.<sup>1</sup> The same principles which maintained negro slavery in the English colonies on the seaboard would have upheld it in the territory; but its legality there seems to have been ascribed to the law of France.<sup>2</sup>

But such inquiries are rendered unnecessary by the legislative act of the people of the United States, after they had ac-

<sup>1</sup> The articles of capitulation between Lord Amherst and the Marquis de Vaudreuil, the French Governor, Sept. 8, 1760, may be found in vol. 2 of Capt. Knox's *Historical Journal of the Campaigns, &c.*, p. 438. Art. 47. "The negroes and *panis* [persons held to serve for years under penal law?] of both sexes, shall remain, in their quality of slaves, in the possession of the French and Canadians to whom they belong; they shall be at liberty to keep them in their service in the colony or to sell them; and they may also continue to bring them up in the Roman religion. *Granted*; except those who shall have been made prisoners." Art. 38 stipulated for "the entire peaceable property and possession of the goods, noble and ignoble, movable and immovable, merchandises, furs, and other effects, even their ships," of the French inhabitants. The personality of the slaves seems specially recognized. 30 Geo. 3, c. 27 (1790). *An act for encouraging new settlers in his Majesty's colonies, &c.*, allows immigrants from the United States, on license from the governor, to bring their "negroes," furniture, utensils, &c., free of duty. *Provido*, that such negro be not sold within a year. The *whites* are to take the oath of allegiance. The legislature of Upper Canada, 2d sess., by act of July 9, 1793, annulled this law; confirmed the possession of the slaves then living; and limited the service of those after born to twenty-five years.

<sup>2</sup> *Chouteau v. Pierre*, 9 Missouri 7; S. C. 3 Western Law Journal; Jarrot v. Jarrot, 2 Gilman 7, 8.

quired all political rights belonging to any of the several States known as *An Ordinance for the government of the Territory of the United States northwest of the river Ohio*, passed July 13, 1787, in which, after providing for the organization of a local Territorial Government as therein contemplated,<sup>1</sup> it is declared that "the following articles shall be considered articles of compact between the original States and the people and States in the said territory, and forever remain unalterable unless by common consent." The first of these provides for freedom of religious opinion. The second secures to the inhabitants, without any personal distinction, habeas corpus, and trial by jury, and guarantees a proportionate representation of the people in the legislature and judicial proceedings according to the course of the common law, &c., as in older bills of rights. The third provides for the encouragement of schools and the preservation of good faith with the Indians. The fourth contains various provisions affecting the rights of persons in respect to things; the last clause of which is, "The navigable waters leading into the Mississippi and St. Lawrence, and the carrying places between the same, shall be common highways, and forever free as well to the inhabitants of the said territory as to the citizens of the United States, and those of any other States that may be admitted into the confederacy, without any tax, import, or duty therefor." The fifth article provides for the formation out of the said territory of "not less than three nor more than five States, as soon as Virginia shall alter her act of cession and consent to the same."<sup>2</sup> The sixth article is as follows:

<sup>1</sup> Freehold estate was the only distinctive qualification for the electors of the assembly therein spoken of. The last clause of this ordinance repealed the resolutions of the 23d of April, 1784, "relative to the subject of this ordinance." But these related to *all* the western territory. IX. Journals, 151. These, as reported by Mr. Jefferson, contained a prohibition of slavery after the year 1800. See the vote on striking out, *ib.* 139; 3 Hild. 449; 7 Dane's Abr. 443.

<sup>2</sup> The Virginia act of Oct. 20, 1783, authorizing the cession of the claims of the State, contained a condition as to the number of States which should be formed in the northwest territory. "and that the States so formed shall be distinct republican States and admitted members of the federal Union, having the same right of sovereignty, freedom and independence as the other States," referring to an act of Congress of the 13th September preceding. Congress, by Resolution, July 7, 1786, recommended a modification of these terms of cession as to the number of the States to be formed, and it is here in the Ordinance anticipated. The assent of Virginia was given Dec. 30, 1788.



"There shall be neither slavery nor involuntary servitude in the said territory, otherwise than in the punishment of crimes, whereof the party shall have been duly convicted; provided, always, that any person escaping into the same from whom labor or service is lawfully claimed in any one of the original States, such fugitive may be lawfully reclaimed and conveyed to the person claiming his or her labor or service as aforesaid." 1 B. & D. p. 475. I. U. S. Stat. p. 51, note. 7 Dane's Abridgment, App. note A.<sup>1</sup>

So far as it was not modified by these provisions the "common law" of England, determining "personal rights,"<sup>2</sup> would have had force in the territory, either as a consequence of the continuation of a former local law, resting on the authority of the ceding States, or by a recognition of the personal character of the law determining those rights when attributed to immigrants from the older States, or by the operation of that international rule which has been stated in the second chapter of this work—the so-called rule of comity.<sup>3</sup> The effect of these principles, in determining the rights and obligations of private persons within the Territories of the United States, will be further examined hereinafter.

1788, Sept. 6. By the governor and judges, as empowered by the Ordinance,<sup>4</sup> *A law respecting crimes and punish-*

<sup>1</sup> In *Merry v. Chexnaider*, 20 Martin's La., 699:—Held, there was nothing in the deed of cession of Virginia to deprive Congress of power to enact the 6th article. *Whinny v. Whitesides*, 1 Missouri, 472. Congress, under the articles of confederation, had power to prohibit the importation of slaves into the territory. *Merry v. Tiffin*, ib. 724, and to declare free all who should be born there; and so in *Jarrot v. Jarrot*, 2 Gilman, 1. But the ordinance is not to be construed strictly as a penal statute, and does not of itself emancipate slaves brought for temporary purpose. *Lagrange v. Chouteau*, 2 Missouri, 19. But, held, in *Theoteste v. Chouteau*, ib. 144, that slaves who were held there at the time did not become free, because the deed of cession provides that "the inhabitants shall be protected in their rights and liberties," and secures to them the rights they then had. The ordinance does not conflict with the operation of the constitutional provision for the delivery of fugitive slaves in the northwestern States. *Jones v. Van Zandt*, 5 Howard, 230. *Vaughan v. Williams*, 3 Western Law Journal, 65, S. C. 3 McLean, 530. Generally, as to the effect of the ordinance as against the sovereignty of those States, see *Spooner v. McConnell*, 1 McLean, 337.

<sup>2</sup> *Ante*, § 108.

<sup>3</sup> *Ante*, § 114.

<sup>4</sup> The Ordinance provided for the organization of a local government, with a legislative Assembly, when there should be five thousand free male inhabitants of full age, and that "The governor and judges, or a majority of them, shall adopt and publish in the district such laws of the original States, criminal and civil, as may be necessary and best suited to the circumstances of the district, and report



*ments*, ch. 6 of Terr. Laws. Sec. 19. Provides for the punishment, by imprisonment, of children or servants refusing to obey lawful commands of their parents or masters, and, by whipping, for striking a master or parent, on complaint to a justice of the peace. 1 Chase's Stat. of Ohio, p. 97. Confirmed T. L. c. 86, § 1. (Repealed O. L. c. 53, § 38.)

**1795.**—By the governor and judges,<sup>1</sup> *A law to regulate taverns*, ch. 51, of T. L., 1 Chase, 165. Sec. 9 provides a penalty for selling strong liquors to "any bond servant or slave." (Repealed T. L. c. 132, § 9.) Ch. 64 of T. L. 1 Chase, 190,—*A law declaring what laws shall be in force*. "The common law of England, and all statutes or acts of the British parliament made in aid of the common law prior to the fourth year of king James the First (and which are of a general nature and not local to that kingdom), and also the several laws in force in this territory, shall be the rule of decision, and shall be considered as of full force until repealed by legislative authority or disapproved by Congress."<sup>2</sup> Ch. 74, of T. L. 1

them to Congress from time to time, which laws shall be in force until the organization of the General Assembly therein, unless disapproved by Congress." 1 Chase's L. Oh. 19:—"The governor and judges did not strictly confine themselves within the limits of their legislative authority, as prescribed by the Ordinance. When they could not find laws of the original States suited to the condition of the country they supplied the want by enactments of their own. The earliest laws from 1788 to 1795 were all thus enacted."

<sup>1</sup> Constitution of United States declared to be ratified Sept. 13, 1788. Journals of Congress. 1789, Aug. 7. *An act to provide for the government of the territory northwest of the river Ohio*, I. U. S. St. 50, 2 B. & D. 83, places the Government of the territory in the same relation to the Government under the Constitution that it had, under the Ordinance, been to "the United States in Congress assembled." 1792, May 8. *An act respecting the government of the territory, &c., northwest and south of the river Ohio*. I. U. S. St. 285, 2 B. & D. 311. Sec. 2 empowers the governor and judges of the Northwest Territory to repeal laws made by them.

<sup>2</sup> 1 Chase's L. Oh. p. 25:—"Before the year 1795 no laws were, strictly speaking, adopted. Most of them were framed by the governor and judges to answer particular public ends." Ibid. p. 26:—"In 1795 the governor and judges undertook to revise the territorial laws and establish a complete system of statutory jurisprudence by adoptions from the laws of the original States, in strict conformity with the provisions of the Ordinance." \* \* \* "Finally, as if with a view to create some great reservoir from which whatever principles and powers had been omitted in the particular acts might be drawn, according to the exigency of circumstances, the governor and judges adopted a law providing that the common law of England," [&c., as in text above.] "The law thus adopted was an act of the Virginia legislature, passed before the Declaration of Independence, when Virginia was yet a British colony, and at the time of its adoption had been repealed so far as related to the English statutes," (Ed. cites 2 Call, 404. 4 Hen. & Mun. 19, 20, 21. 1 Wash. 83. 6 Mun. 148. 1 O. R. 245.)

Chase, 203, *A law limiting imprisonment for debt, and subjecting certain debtors and delinquents to servitude.* (Rep. T. L. ch. 108, § 1. O. L. c. 102.)

**1800.**—*An act providing for the trial of homicide committed on Indians.*<sup>1</sup> Ch. 135 of Terr. L. 1 Chase, 296.

**1802,**<sup>2</sup> November. Convention adopts a State Constitution for the eastern division of the N. W. Territory. 1 O. L. 31. Art. 4, limits the elective franchise to white male persons. Art. 8, a Bill of Rights. Sec. 1. "That all men are born equally free and independent and have certain natural inherent inalienable rights," &c. Sec. 2. "There shall be neither slavery nor involuntary servitude in this State otherwise than for the punishment of crimes, whereof the party shall have been duly convicted, nor shall any male person arrived at the age of twenty-one years, or female person arrived at the age of eighteen years, be held to serve any person as a servant under the pretence of indenture or otherwise, unless such person shall enter into such indenture while in a state of perfect freedom, and on condition of a *bona fide* consideration, received or to be received for their service, except as before excepted. Nor shall any indenture of any negro or mulatto hereafter made and executed out of the State, or if made in the State, where the term of service exceeds one year, be of the least validity, except those given in the case of apprenticeship."

"The other laws of 1795 were principally derived from the statute book of Pennsylvania." \* \* "From this time to the organization of the territorial legislature in 1799 there were no acts of legislation except two laws adopted by the secretary and judges in 1798."

<sup>1</sup> By the territorial government of the second grade, established in accordance with the ordinance of 1787, having a legislative Assembly distinct from the executive and judiciary. 1 Chase's Stat. O. p. 27.

<sup>2</sup> 1800, May 7. *An act to divide the territory of the United States northwest of the river Ohio into two separate governments.* II. U. S. St. 58, 3 B. & D. 367. These are divided by the present western boundary of Ohio. 1802, April 30. *An act to enable the people of the eastern division of the territory northwest of the river Ohio to form a Constitution and State government, and for the admission of such State into the Union on an equal footing with the original States, and for other purposes.* II. U. S. St. 173, 3 B. & D. 496. Sec. 5 provides that the Constitution and government of the State "shall be republican and not repugnant to the ordinance of the 13th July, 1787, between the original States and the people and States of the territory northwest of the river Ohio." 1803, Feb. 19. *An act to provide for the due execution of the laws of the United States within the State of Ohio.* II. U. S. St. 201, 3 B. & D. 524.



**1803-4**, 2d Sess. c. 4. *An act to regulate black and mulatto persons.* O. L. c. 28. 1 Chase, 393. Sec. 1. That no black or mulatto person shall be permitted to settle or reside in this State "without a certificate of his or her actual freedom." 2. Resident blacks and mulattoes to have their names recorded, &c. (Amending is 1834, Jan. 5, 1 Curwen, 126.) *Proviso*, "That nothing in this act contained shall bar the lawful claim to any black or mulatto person." 3. Residents prohibited from hiring black or mulatto persons not having a certificate. 4. Forbids, under penalty, to "harbor or secrete any black or mulatto person the property of any person whatever," or to "hinder or prevent the lawful owner or owners from retaking," &c. 5. Black or mulatto persons coming to reside in the State with a legal certificate, to record the same. 6. "That in case any person or persons, his or their agent or agents, claiming any black or mulatto person that now are or hereafter may be in this State, may apply, upon making satisfactory proof that such black or mulatto person or persons is the property of him or her who applies, to any associate judge or justice of the peace within the State, the associate judge or justice is hereby empowered and required, by his precept, to direct the sheriff or constable to arrest such black or mulatto person or persons and deliver the same in the county or township where such officers shall reside, to the claimant or claimants, or his or their agent or agents, for which service the sheriff or constable shall receive such compensation as they are entitled to receive in other cases for similar services." 7. "That any person or persons who shall attempt to remove or shall remove from this State, or who shall aid and assist in removing, contrary to the provisions of this act, any black or mulatto person or persons, without first proving, as hereinbefore directed, that he, she, or they is or are legally entitled so to do, shall, on conviction thereof before any court having cognizance of the same, forfeit and pay the sum of one thousand dollars, one-half to the use of the informer and the other half to the use of the State, to be recovered by the action of debt *quittam* or indictment, and shall moreover be liable to the action of the party injured.

**1806-7**, Sess. L. c. 8. *An act to amend the act entitled*

"*an act regulating black and mulatto persons.*" O. L. c. 139. 1 Chase, 555. Sec. 1. Provides that no negro or mulatto persons shall be permitted to settle within the State without giving bond not to become chargeable. 2. Duties of clerk. 3. Provides penalty for harboring or secreting negro or mulatto persons contrary to the provisions of the first section.<sup>1</sup> 4. That no black or mulatto person or persons shall hereafter be permitted to be sworn or give evidence in any court of record, or elsewhere in this State, in any cause depending or matter of controversy where either party to the same is a white person, or in any prosecution which shall be instituted in behalf of this State, against any white person.<sup>2</sup> Rep. 1849.

1818-19.—*An act to prevent kidnapping.* O. L. ch. 443. 2 Chase L. 1052. Preamble recites the provisions of the law of Congress, Feb. 12, 1793, respecting fugitives from labor, and enacts, "That if any person or persons, under any pretence whatsoever, shall by violence, fraud or deception, seize upon any free black or mulatto person, within this State, and keep or detain such free black or mulatto person in any kind of restraint or confinement, with intent to transport such free black or mulatto person out of this State, contrary to law, or shall in any manner attempt to carry out of this State any black or mulatto person without having first taken such black or mulatto person before some judge of the circuit or district court, or justice of the peace in the county wherein such black or mulatto person was taken, agreeably to the provisions of the above-recited act of Congress, and there prove his right to such black or mulatto person; every such person so offending shall be deemed guilty of a high misdemeanor, and on conviction thereof before any court having competent authority to try the same, shall be confined in the penitentiary of this State, at hard labor, for any space of time, not less than one or more than ten years, at the discretion of the court."

<sup>1</sup> See *Birney v. State*, 8 Ohio, 230.

<sup>2</sup> This section does not extend to persons of a shade nearer white than mulatto. Such persons are admissible as witnesses; and against such the testimony of negroes and mulattoes cannot be received. *Gray v. Ohio* (1831), 4 O. R. 353. *Jordan v. Smith* (1846), 14 Ohio, 199:—A black person sued by a white, may make affidavit to a plea so as to put the plaintiff to proof. But Read, J., dissented.



**1830-31.**—An act to prevent kidnapping. Replacing the act of 1819. O. L. ch. 881. 3 Chase L. 1878. Sec. 1. "That no person or persons, under any pretence whatever shall, by violence, fraud, or deception, seize upon any free black or mulatto person within this State, and keep such free black or mulatto person in any kind of restraint or confinement with intent to transport such black or mulatto person out of the State." 2. "That no person or persons shall in any manner attempt to carry out of this State, or knowingly be aiding in carrying out of this State, any black or mulatto person, without first taking such black or mulatto person before some judge or justice of the peace in the county where such black or mulatto person was taken, and there, agreeably to the laws of the United States<sup>1</sup> establish by proof his, her, or their property in such," &c. 3. Provides for the punishment of offenders.

**1839.**<sup>2</sup>—*An act relating to fugitives from labor or service from other States.* 37 O. L. 43. Curwen, p. 533. "Whereas, the second section of the fourth article of the Constitution of the United States declares that "no person, &c. (reciting it). And whereas the laws now in force within the State of Ohio are wholly inadequate to the protection pledged by this provision of the Constitution to the Southern States of this Union; and, whereas it is the duty of those who reap the largest measure of benefits conferred by the Constitution to recognize to their full extent the obligations which that instrument imposes; and whereas it is the deliberate conviction of this General Assembly that the Constitution can only be sustained as it was framed by a spirit of just compromise; therefore." Sec. 1. Authorizes judges of courts of record, "or any justice of the peace, or the mayor of any city or town corporate," on application, &c., of claimant, to bring the fugitive before a judge within the

<sup>1</sup> Peck, J., 9 Ohio, 212:—refers to these statutes and that of 1819 as a recognition by the State of Ohio of the power of Congress to pass the act of 1793, though that act is not here specially mentioned.

<sup>2</sup> *An act of 1834, concerning fugitives from justice.* Swan, 546; Curwen, c. 26:—Authorizes justices to arrest and requires them to give notice; but there is no provision as to any action on the part of the governor. And this is repealed by an act of 1860, Ohio L., vol. 57, p. 82, which allows justices, &c., to commit and give notice only when the person is charged with an act which would have been punishable if committed in Ohio.

county where the warrant was issued, or before some State judge with certain cautions as to proving the official character of the officer issuing the warrant; gives the form of warrant, directing the fugitive to be brought before, &c., "to be dealt with as the law directs." 2. Claimant to give security for costs. On proof of his claim, the judge to give a certificate which shall be authority for removing the fugitive. 3. Punishment by fine and imprisonment for hindering officer from arresting or removing fugitive. 4. How securities shall be given when the hearing is postponed for benefit of either party. 5. The judge shall hear the case, "and if it shall be proven to his satisfaction that the party arrested does owe labor or service to the claimant," he shall give the latter a certificate. 6. Penalty for enticing away persons owing labor. 7. Penalty for giving a false certificate of emancipation to the fugitive or harboring him. 8. Fees. 9. "It shall be the duty of all officers proceeding under this act to recognize, without proof, the existence of slavery or involuntary servitude in the several States of this Union, in which the same may exist or be recognized by law." 10. Perjury in such cases punished. 11. "If any person or persons shall in any manner attempt to carry out of this State or knowingly be aiding in carrying out of this State any person without first obtaining sufficient legal authority for so doing according to the laws of this State or of the United States, every person so offending shall be deemed guilty of a misdemeanor, and, upon conviction therefor, shall," &c. 12. Repeals so much of sec. 4 of the act of 1804, and of sec. 2 of the act of 1831, as is inconsistent. 13. That a trial and judgment under the act of Congress of 1793, or a trial and judgment under the provisions of this act, shall be adjudged a final bar to any subsequent proceeding against such fugitive under the provisions of this act.

**1843.**—An act repealing the above act, and reviving sec. 2 of the act of 1831. 41 O. L. 13. Curwen, p. 924.<sup>1</sup>

<sup>1</sup> The State law against kidnapping seems to have been declared unconstitutional, if applied to persons carrying away escaped slaves according to the acts of Congress, by the Supreme Court of Ohio, in 1846, resting on *Prigg's case*. *Richardson v. Beebe*, 9 Law Reporter, 316; see *Op. Swan, J.*, 9 Critchfield's Oh. 187.

**1849.**—*An act to authorize the establishment of separate schools for the education of colored children, and for other purposes.* 47 O. L. p. 17. Curwen, c. 893. Sec. 5. "The term colored, as used in this act, shall be construed as being of the same signification as the term 'black or mulatto,' as used in former acts." 6. Repeals an act on the same subject, of 1848 [Curwen, ch. 849], the act of 1804, and the amending acts, "and all parts of other acts so far as they enforce any special disabilities or confer special privileges on account of color," except certain acts relating to juries and to the relief of the poor.

**1851.**—A new Constitution. Art. I. sec. 6. "There shall be no slavery in this State, nor involuntary servitude, unless for the punishment of crime." Art. V. sec. 1, restricts the elective franchise to whites.\* Art. IX. sec. 1. Militia service imposed on whites only.

**1857.**—*An act to prohibit the confinement of fugitives from slavery in the jails of Ohio.* 54 O. L. p. 170; repealed 1858, see 55 O. L. p. 10, and an act of 1859, Oh. L. vol. 54, p. 158, requires State jailers to receive all persons committed by the authority of the United States.

—*An act to prevent slaveholding and kidnapping in Ohio.* 54 O. L. 186. Enacts that a person bringing another into the State with the intent "to hold or control, or who shall hold or control, or shall assist in holding or controlling, directly or indirectly, within this State, any other person as a slave," shall be deemed guilty of false imprisonment, and be punishable by fine and imprisonment, "and every person coming within this State, otherwise than as a person held to service in another State, under the laws thereof, and escaping into this State, shall be deemed and held in all courts as absolutely free. 2. Penalty for seizing such person as a fugitive slave. 3. Penalty for kidnapping. 4. "Nothing in the preceding sections of this act shall apply to any act done by any person under the authority of the Con-

\* That all persons nearer white than black are "white," has been decided in *Jeffries v. Ankeny*; *Thacker v. Hawk*, 11 Ohio R. 372, 376; *Lane v. Baker*, 12 Ohio R. 237; *Williams v. School District*, *Wright's R.* 578, where *Gray v. Ohio*, 4 Oh., 354, is cited.

\* *Anderson v. Millikin*, 9 Critchfield's Oh., 568:—That persons having a preponderance of white over negro blood are not excluded from voting.



stitution of the United States, or of any law of the United States made in pursuance thereof." *Repealed* in 1858; see 55 Oh. L. p. 19.

— *An act to prevent kidnapping.* 54 O. L. 221. Sec. 1. Against kidnapping free blacks. 2. "That no person shall kidnap or forcibly or fraudulently carry off or decoy out of this State any black or mulatto person or persons within this State, claimed as fugitives from service or labor, or shall attempt to kidnap or forcibly or fraudulently carry off or decoy out of this State any such black or mulatto person or persons, without first taking such black or mulatto person or persons before the court judge or commissioner of the proper circuit, district, or county having jurisdiction according to the laws of the United States, in cases of persons held to service or labor in any State escaping into this State, and there, according to the laws of the United States, establishing by proof his or their property in such person." 3. Punishment for offending against the above by imprisonment at hard labor. 4. Repeals the act of 1831.<sup>1</sup>

1859.—An act, Oh. L. vol. 56, p. 120. Judges of elections required to reject the offered vote of a person "who has a distinct and visible admixture of African blood."<sup>2</sup>

<sup>1</sup> In *Richardson v. Beebe*, 3 Western Law Journal (Sept. 1846), p. 563, the plaintiff had been arrested under the act of 1831 for carrying away one Berry, a black man, without taking him "before any judge or justice of the peace in said county, and without establishing his right of property in him agreeably to the laws of the United States, before any justice in said county." Wood, C. J., and Burchard, J., in the Supreme Court of Ohio, held that the warrant showed that the person had been seized and removed as a slave, and not as a freeman; that, on *Prigg's* case, the State law was void in interfering with such an arrest, and held that the warrant committing the plaintiff was void on the face.

<sup>2</sup> This is reported to have been held unconstitutional, so far at least as it might affect persons having more than one half white blood, in the Cuyahoga Common Pleas, in the case of one Watson.

No law expressly authorizing the executive to surrender fugitives from justice, in accordance with the Constitution of the United States, seems ever to have been passed in Ohio. An act of Feb. 22, 1811, *To secure the benefit of the writ of habeas corpus*, 29 Oh. L. 164 (Swan's St. of 1854, c. 54), sec. 9, declared that citizens should not be sent out of the State, but with proviso that persons charged with having committed treason, felony, or misdemeanor in any other part of the United States might be sent to the State having jurisdiction. But this appears to have been repealed in 1856, being omitted in the re-enactment of that year and of 1858. See Correspondence, Mar., 1860, between the Governors of Ohio and Kentucky, in cases of Merriam and Brown.



## § 560. LEGISLATION OF THE STATE OF INDIANA.

On the separate organization, in 1800, of that portion of the Northwest Territory which afterwards became the State of Ohio,<sup>1</sup> the remainder was designated the *Indiana Territory*, in which the laws of the former Northwest Territory continued with the guarantees in the ordinance of 1787.

1803, Sep. 22. A law of this date—a law concerning servants—is referred to in the act next cited.<sup>2</sup>

1806,<sup>3</sup> 2d. Sess. 1st Assembly, c. 10, concerning executions. Sec. 7. "And whereas doubts have arisen whether the time of service of negroes and mulattoes, bound to service in this Territory, may be sold on execution against the master, *Be it therefore enacted* that the time of service of such negroes or mulattoes may be sold on execution against the master, in the same manner as personal estate, immediately from which sale the said negroes or mulattoes shall serve the purchaser or purchasers for the residue of their time of service; and the said purchasers and negroes and mulattoes shall have the same remedies against each other as by the laws of the Territory are mutually given them in the several cases therein mentioned, and the purchasers shall be obliged to fulfill to the said servants the contracts they made with the masters as expressed in the indenture or agreement of servitude, and shall, for want of such contract, be obliged to give him or them their freedom due at the end of the time of service, as expressed in the second section of a law of the Territory, entitled 'Law concerning servants,' adopted the twenty-second day of September, eighteen hundred and three. This act shall commence and be in force from and after the first day of February next." —, c. 19. *An act concerning servants and slaves* enacts that servants and

<sup>1</sup> See act of Congress of May 7, 1800, *ante*, p. 116 n. 3. Sec. 4. Provides for a general assembly, as by the act for the government of the Northwest Territory, whenever it shall be "the wish of a majority of the freeholders." The elective franchise is not fixed.

<sup>2</sup> *Cornelius v. Cohen*, Breese, 92. An indenture signed, in 1804, by the negro alone, that is, not before the clerk of the county court, held void.

<sup>3</sup> Jan. 11, 1805. *An act to divide the Indiana Territory into two separate governments*. II. U. S. Stat. 309, 3 B. & D., 632:—Separates the Indiana Territory from the Michigan Territory by the present boundary between the States bearing those names.

*slaves* shall have passes, shall not wander about, and forbids harboring them, under penalty.

1807, Sep. 17. *An act for the introduction of negroes and mulattoes into this Territory.*<sup>1</sup> Terr. laws 1807-8, 423. Sec. 1. Provides "That it shall and may be lawful for any person being the owner or possessor of any negroes or mulattoes of and above the age of fifteen years and owing service and labor as slaves in any of the States or Territories of the United States or for any citizens of the said States or Territories purchasing the same to bring the said negroes and mulattoes into this Territory." 2. "The owners or possessors of any negroes or mulattoes as aforesaid, and bringing the same into this Territory, shall within thirty days after such removal go with the same before the clerk of court of common pleas of proper county, and in presence of said clerk the said owner or possessor shall determine and agree to and with his or her negro or mulatto upon the term of years which the said negro or mulatto will and shall serve his or her said owner or possessor," and the clerk shall make a record. 3. "If any negro or mulatto removed into this Territory as aforesaid, shall refuse to serve his or her owner as aforesaid, it shall and may be lawful for such person within sixty days thereafter to remove the said negro or mulatto to any place [to] which, by the laws of the United States or Territory from whence such owner or possessor may [have come] or shall be authorized to remove the same." (As quoted in *Phœbe v. Jay*, Breese Ill. R. 208.) 4. An owner failing to act as required in the preceding sections should forfeit all claim and right to the service of such negro or

<sup>1</sup> The territorial government from time to time memorialized Congress for the purpose of modifying the ordinance of 1787, so as to allow the temporary introduction of slaves born within the United States. A committee of the House of Representatives, John Randolph, Chairman, reported, March 2, 1803, adversely. 1 Am. State Papers, Public Lands, p. 146. A committee of the same body, Feb. 17, 1804, reported a resolution favoring the petition with certain limitations. 1 Am. State Papers Misc. 387. A similar report made Feb. 14, 1806. Ibid. 450. To another resolve of the territorial legislature, Ib. 467, a committee of the House, 12 Feb., 1807, reported favorably. Ib. 477. To a similar resolve a committee of the Senate, Nov. 13, 1807, reported adversely. Ib. 484.

<sup>2</sup> In *Rankin v. Lydia* (1820), 2 A. K. Marshall, 469, held that if brought back to Kentucky the slave is there entitled to freedom.



mulatto. 5. "Declares that any person removing into this Territory and being the owner or possessor of any negro or mulatto as aforesaid, under the age of fifteen years; or if any person shall hereafter acquire a property in any negro or mulatto under the age aforesaid and who shall bring them into this Territory, it shall and may be lawful for such person, owner or possessor to hold the said negro to service or labor, the males until they arrive at the age of thirty-five, and females until they arrive at the age of thirty-two years." Sec. 6. Provides that any person removing any negro or mulatto into this Territory under the authority of the preceding sections, it shall be incumbent on such person within thirty days thereafter to register the name and age of such negro or mulatto with the clerk of the court of common pleas for the proper county. 8. Requires new registry on removal to another county. 8, 9. Penalties by fine for breach of this act. 10. Clerk to take security that negro be not chargeable when his term expires. 12. Fees. 13. That "the children born in said Territory of a parent of color owing service or labor, by *indenture* according to law, should serve the master or mistress of such parent, the males until the age of thirty and the females until the age of twenty-eight years." (As quoted in *Boon v. Juliet*, 1836, 1 Scammon, 258.) 14. That an act respecting apprentices misused by their master or mistress should apply to such children.<sup>1</sup> (See the

<sup>1</sup> *Phoebe v. Jay* (1828), Breese Ill. R. 208. Opinion of the court, Lockwood, J.:—"If the only question to be decided was whether this law of the Territory of Illinois conflicted with the Ordinance, I should have no hesitation in saying that it did. Nothing can be conceived farther from the truth, than the idea that there could be a voluntary contract between the negro and his master. The law authorizes the master to bring his slave here and take him before the clerk, and if the negro will not agree to the terms proposed by the master, he is authorized to remove him to his original place of servitude. I conceive that it would be an insult to common sense to contend that the negro under the circumstances in which he was placed had any free agency. The only choice given him, was a choice of evils. On either hand, servitude was to be his lot. The terms proposed were, slavery for a period of years, generally extending beyond the probable duration of his life, or a return to perpetual slavery in the place from whence he was brought. The indenturing was, in effect, an involuntary servitude for a period of years, and was void, being in violation of the Ordinance, and had the plaintiff asserted her right to freedom, previous to the adoption of the Constitution of this State, she would, in my opinion, have been entitled to it." This case recognized and approved in *Boon v. Juliet*, 1 Scammon, 258; and *Sarah v. Borders*, 4 ib. 345.

statute cited in *Rankin v. Lydia*, 2 A. K. Marshall's Ky. 467; and in *Jarrot v. Jarrot*, 2 Gilman 19.) This act was repealed in 1810.

**1807,**<sup>1</sup> Sept. 17. *An act concerning executions.* 1 Rev. Code of 1807, p. 188. Sec. 7 recites, "And whereas doubts have arisen whether the time of service of negroes and mulattoes, bound in this territory, may be sold under execution," it was therefore enacted "that the time of service of such negroes and mulattoes may be sold on execution," &c. — "on the same day an act was passed subjecting 'bound servants' with a variety of personal property to taxation. By the third section of the act *concerning servants*, passed also on the 17th Sept., 1807 [2 Rev. Code of 1807, p. 647], the benefit of the contract of service may be assigned by the master with the consent of the servant, and shall pass to the executors, administrators, and legatees of the master."<sup>2</sup>

**1810,**<sup>3</sup> Dec. 14. 3d. Assembly, 1st. Sess. c. 28. *An act to repeal an act entitled an act for the introduction of negroes and mulattoes into this Territory, and for other purposes.* Sec. 1. Repeals the act of 1807. 2. That if any person or persons shall attempt to remove from this Territory, or shall aid or assist in removing any negro or mulatto person or persons, without first proving before one of the judges of the court of Common Pleas, or justice of the peace, who shall give a certificate thereof, to be filed in the clerk's office in the county wherein such proof shall be made, that he or she or they are legally entitled so to do, according to the laws of the United States and of this Territory," such shall "pay a fine of \$1000, be liable to an act by the party aggrieved, and be disqualified

<sup>1</sup> An act of Congress of Feb. 27, 1808, II. U. S. Stat., 469, limits the elective franchise to free white males. Other acts of Congress on electoral law, Feb. 27, 1809, ib. 525; March 4, 1814, III. U. S. Stat., 103.

<sup>2</sup> This citation is from *Nance v. Howard*, Breese, 184, where it is said:—"This section, taken in connection with its preamble, must be considered as declaratory of what the law was rather than introductory of a new rule." But it must be noticed it was still a property created by positive enactment. See *post*, law of 1827, Jan. 24.

<sup>3</sup> Feb. 3, 1809. *An act for dividing the Indiana Territory into two separate governments*, II. U. S. Stat., 514, 4 B. & D. 198, separates the Indiana Territory from the Illinois Territory by the present boundary between the States of these names.



from holding office. 3. Repeals sec. 1 of *An act concerning servants of color* (*Query*, the act of 1803?), saving, however, to such persons as may heretofore have executed indentures of servitude, their right under the same, and their master his remedy thereon.

**1816.**—First Constitution of Indiana.<sup>1</sup> Art. I. Bill of Rights. Sec. 1. "That all men are born equally free and independent, and have certain natural, inherent and unalienable rights," &c. The franchises are not limited to *freemen*. Art. VIII., providing for amendments: "But as the holding any part of the human creation in slavery or involuntary servitude can only originate in usurpation and tyranny, no alteration of this Constitution shall ever take place, so as to introduce slavery or involuntary servitude in this State, otherwise than for the punishment of crimes whereof the party shall have been duly convicted." Art. XI. Sec. 7. "There shall be neither slavery nor involuntary servitude in this State otherwise than for the punishment of crimes whereof the party shall have been duly convicted. Nor shall any indenture of any negro or mulatto hereafter made and executed out of the bounds of this State be of any validity within this State."<sup>2</sup>

**1816**, c. 24. *An act to prevent man-stealing*. Sec. 1, de-

<sup>1</sup> April 19, 1816. *An act to enable the people of Indiana Territory to form a Constitution and State government, and for the admission of such State into the Union on a footing with the original States*. III. U. S. St. 289, 6 B. & D. 66. Sec. 3. "All male citizens of the United States of full age, who have resided," &c., are qualified to vote. 4. Enabling a convention chosen under this act to form a Constitution and State government; with proviso that it be republican, and not repugnant to the ordinance of July 13, 1787. Formal acceptance by the Convention of the propositions of Congress, June 26, 1816; Rev. L. of Ind. p. 37. Dec. 11, 1816. Joint Resolution admitting Indiana as one of the United States; III. U. S. Stat. 399. 6 B. & D. 248. March 3, 1817. An act to provide for the due execution of the laws of the United States within the State of Indiana. III. U. S. Stat. 390.

<sup>2</sup> That this entirely prohibited the condition of involuntary servitude; *State v. Laselle* (1820), 1 Blackf. Ind., 61. *Mary Clark's* (a woman of color) case (1821), 1 Blackf. Ind. R. 122, *Marg*:—"A free woman of color, above 21 years of age, bound herself by indenture in this State for a valuable consideration, to serve the obligee as a menial servant for 20 years. Held, that a specific performance of the contract could not be enforced, and that upon habeas corpus she had a right to be discharged from custody." "Application to be discharged on habeas corpus proves the service to be involuntary within the meaning of the Constitution." "An indenture executed out of this State by a negro or mulatto is void, and can neither be specifically enforced nor made the foundation of an action for damages."

fining the crime,—taking “out of the State under any pretence whatsoever, without establishing his, her, or their claim, according to the laws of this State, or of the United States.”

2. Penalty therefor. 3. Persons claiming the service of another shall apply to a judge or justice of the peace for a warrant to arrest. The judge or justice shall hear and examine, “and if, in the opinion of said judge or justice of the peace, the plaintiff’s claim be well founded, he shall recognize such person or persons so claimed to appear at the next term of the circuit court, in and for said county, where he, she, or they shall have a fair and impartial trial by a jury of said county; and if on trial as aforesaid the verdict and judgment shall go against” the person claimed, the judge shall give the claimant “a certificate authorizing such claimant to carry him, or her, or them out of the State.” 4. Penalty for giving to fugitive slaves false certificates of emancipation. 5. Penalty for harboring or encouraging slaves held in other States to desert, or for using violence or encouraging slaves to resist after certificate given to the claimant. This is amended by 1818, c. 7, increasing punishment by whipping, and expediting the jury trial.

1817, c. 3. An act relative to the practice of the courts. Sec. 52. “No negro, mulatto, or Indian shall be a witness, except in pleas of the State against negroes, mulattoes, or Indians, or in civil cases where negroes, mulattoes, or Indians alone shall be parties. 53. “Every person other than a negro, of whose grandfathers or grandmothers any one is or shall have been a negro, though his other progenitors may have been white, shall be deemed a mulatto, and so every person who shall have one-fourth part or more of negro blood.” Re-enacted in 1831, R. S. c. 78, § 37. —, c. 5. An act relating to crimes. Sec. 59. Penalty for sexual intercourse between white and black persons, “and it shall not be lawful for any white person to intermarry with any negro in this State.” 1 R. S. 361,—with one having “one eighth or more negro blood.”

1819, March 22, and 1823, Feb. 17. Execution laws provide that the time of service of negroes or mulattoes may be



sold on execution against the master in the same manner as personal estate; immediately from which sale the said negroes or mulattoes shall serve the purchaser or purchasers for the residue of their time of service." Breese, 185, citing Laws of 1819, p. 181, sec. 13; of 1823, p. 173, sec. 9: Judge Lockwood there adds, "There is, however, no such provision in the act relative to executions passed Jan. 17, 1825 (Laws of 1825, p. 151), and which act repeals all former acts; and hence it is argued that the legislature intended in future that registered servants should not be subject to seizure and sale on execution." The judge, however, held the statute only declaratory.

**1824, Jan. 22.** *An act relative to fugitives from labor.* Sec. 1. Claimant may have warrant to arrest and bring the fugitive before a circuit judge or justice of the peace. 2. The judge is to decide on the proofs in a summary way: *proviso*, that either party may appeal, paying costs of trial and security on appeal; and the alleged fugitive must swear that he does not owe labor or service. 3. The trial shall then be before a jury.<sup>2</sup> Re-enacted in R. L. of 1831, ch. 43, and R. S. of 1838, c. 46. (The next chapter in the same collection is the act of Congress of 1793, introduced without note or comment under the title, "Act of Congress.") No law with this title appears in the R. S. of 1852, which contains the act of Congress of 1850, 1 R. S. 532.

**1827, Jan. 24.** *An act concerning attachments.* Authority is given to the sheriff when he "shall serve an attachment on slaves or indentured or registered colored servants, or horses, cattle, or live stock," to provide sustenance for the support of such slaves, &c., until, &c. —, Feb. 19. A revenue law: authorizes levying a tax on town lots, horses, cattle, carriages,

<sup>1</sup> *An act authorizing the arresting and securing fugitives from justice*, of Jan. 22, 1824, gives judges of the Supreme or Circuit Court and justices of the peace authority to arrest, hear proofs, and commit the fugitive, and if he is pursued by a sheriff, &c., to give him a warrant, which shall be authority to remove the fugitive. R. L. of 1831, ch. 42; R. L. of 1838, c. 45; R. S. of 1843, p. 1030. In *Degant v. Michael* (1850), 2 Carter, 396, this is held unconstitutional on the authority of *Prigg's case*. It does not appear in R. S. of 1852.

<sup>2</sup> This statute held unconstitutional in *Graves v. the State* (1849), 1 Carter, 368, S. C., *Smith's Ind. R.* 258, on the authority of *Prigg's case*. And in *Donnell v. The State* (1852), 3 *Porter's Ind. R.* 481, on a conviction under the State law, R. S. of 1843, ch. 53, § 115, for aiding slave to escape and concealing, such State legislation was held void on the authority of *Prigg's case*.

&c., and "on slaves and indentured or registered negro or mulatto servants." See *Nance v. Howard* (1828), 1 Breese, 185,<sup>1</sup> citing Revenue laws of 1827, p. 331.

**1831.**—An act relative to crimes, &c. Sec. 12. *On kidnapping.* Declares every person guilty of this crime who shall remove another out of this State "without having first established a claim upon the services of such person or persons, according to the laws of this State or of the United States." R. L. of 1838, c. 26; 2 R. S. of 1852, p. 400. — An act concerning free negroes and mulattoes, servants and slaves. Rev. S. c. 66. Sec. 1. Negroes and mulattoes emigrating into the State shall give bond, &c. 2. In failure of this such negro, &c., may be hired out and the proceeds applied to his benefit, or removed from the State under the poor law.<sup>2</sup> 3. Penalty for committing such without authority. 4. Penalty for harboring such who have not given bond. 5. "That the right of any persons to pass through this State, with his, her, or their negroes or mulattoes, servant or servants when emigrating or traveling to any other State or territory or country, making no unnecessary delay, is hereby declared and secured."<sup>3</sup> Re-enacted in 1838. R. S. c. 73. All the above acts seem to have been repealed by the general repealing act, June 18, 1852, ch. 92 of R. S. of 1852.

**1851.**—A new Constitution. Art. I. A Bill of Rights like that in the former Constitution, including the prohibition of

<sup>1</sup> See *ante*, law of 1807. In this case, Lockwood J., said, Breese, 184, "These three acts are all the statutes that have been found, passed by the territorial legislature [i.e. all that define the nature of this kind of property]. These acts can bear no other construction than that the legislature considered this description of servants as property, for they rendered them liable to sale on execution, to be assigned by their masters with their consent, to pass to executors, administrators and legatees, and to taxation." The court agree that a poll-tax is inhibited by sec. 20 art. 2 of the Constitution of Ill., adding, "The legislature, however, it will be seen, by examining their several acts relative to revenue, have invariably taxed servants, not by poll, but 'by valuation.'" Compare *ante*, vol. I. p. 230, note. The court rely also on *Sable v. Hitchcock*, 2 Johns. Cases, 79, *ante*, p. 53, note.

<sup>2</sup> Held not unconstitutional in *State v. Cooper* (1839), 5 Blackf. Ind. 258; *Baptiste v. the State*, ib. 283.

<sup>3</sup> The right had been affirmed in the case of Sewell's slaves by Judge Morris in 1829, see 3 Am. Jurist (1st series), 404. When slaves have been emancipated by a will directing to carry them to a State which, like Indiana, prohibits their coming, a question arises, and whether *ex près* applies. A case of this nature has occurred, *ex. of Bledsoe v. La Force*, in the superior court of Putnam county, Georgia,



slavery in art. XI. sec. 7 of the former, but without the phraseology of art. VIII. Art. II. sec. 2. Limits the right of voting to "white male citizens of the United States." 5. "No negro or mulatto shall have the right of suffrage." Art. XII. sec. 1. "The militia shall consist of all able-bodied white male persons, between," &c. Art. XIII. sec. 1. "No negro or mulatto shall come into, or settle in the State after the adoption of this Constitution. 2. All contracts made with any negro or mulatto coming into the State contrary to the foregoing section shall be void; and any person who shall employ such negro or mulatto or encourage him to remain in the State shall be fined not less than ten, nor more than five hundred dollars. 3. All fines which may be collected for a violation of the provisions of this article, or of any law hereafter passed for the purpose of carrying the same into execution, shall be set apart and appropriated for the colonization of such negroes and mulattoes and their descendants as may be in the State at the adoption of this Constitution and may be willing to emigrate. 4. The general assembly shall pass laws to carry out the provisions of this article."

1852, Mar. 5. An act concerning marriages. R. S. ch. 57. Sec. 1. Declares void a marriage "when one of the parties is a white person and the other possessed of one eighth or more of negro blood." — Ap. 28. An act providing for the colonization of negroes and mulattoes and their descendants in Africa. R. S. c. 18. Amending are Sess. L. 1853, c. 16; 1855, c. 38. —, June 18. *An act to enforce the 13th article of the Constitution.* R. S. of 1852, c. 74. Sec. 1. That it shall not be lawful for any negro or mulatto to come into, settle in, or become an inhabitant. 2-5. On the registry of free negroes. 6-8. Annulling contracts made with such. 7-9. Penalties for encouraging such to come, and for such coming.<sup>2</sup>

1853, Sess. L. c. 42. *An act to prohibit the evidence of Indians and persons having one eighth or more of negro blood, in all cases where white persons are parties in interest.*

<sup>1</sup> This Constitution was submitted to a vote of the electors, and the thirteenth article separately voted on.

<sup>2</sup> No State law empowering the executive to deliver up fugitives from justice appears to have been passed.

## § 561. LEGISLATION OF THE STATE OF ILLINOIS.

On the separate organization, in 1809, of that portion of Indiana Territory which afterwards became the State of Indiana, the pre-existing laws of the old Indiana Territory continued in the western portion, then known as the Territory of Illinois,<sup>1</sup> on the mere principle of the continuation of laws, and in 1812, Dec. 13, by the territorial legislature it was enacted that "all laws passed by the legislature of Indiana Territory which were in force on the first day of March, 1809, in that Territory, that are of a general nature and not local to Indiana Territory, and which are not repealed by the governor and judges of the Illinois Territory, are hereby declared to be in full force in this Territory." (See *Hays v. Borders*, 1 Gilman 46.)<sup>2</sup>

**1818.**—First Constitution of the State of Illinois.<sup>3</sup> Art. II. sec. 27. Limits the elective franchise to "free white" persons. Art. V. sec. 1. Excepts "negroes, mulattoes, and Indians" from the militia of the State. Art. VI. sec. 1. "Neither slavery nor involuntary servitude shall hereafter be introduced into this State otherwise than for the punishment of crimes whereof the party shall have been duly convicted; nor shall any male person arrived at the age of twenty-one years, nor female person arrived at the age of eighteen years, be held to serve any person as a servant under any indenture hereafter made unless such person shall enter into such indenture while in a state of perfect freedom and on a condition of a bona fide consideration received or to be received for their service. Nor shall any in-

<sup>1</sup> The act of Feb. 3, 1809 (*ante*, p. 126, note 3). Sec. 2. Provides for a territorial government in the Illinois like that of the Northwest Territory under the Ordinance of 1787, and the act of Aug. 7, 1789, and secures to the inhabitants the advantages of that Ordinance. The act of May 20, 1812, *An act to extend the right of suffrage in the Illinois Territory and for other purposes*, II. Stat. U. S. 741; 4 B. & D. 435, sec. 1, limits suffrage to free white male persons.

<sup>2</sup> Negroes had been held in slavery by the French settlers. A law of Virginia, of 1778 (9 Hen. p. 552), recited conquest of the country by the State, and provided for government of a county there, named Illinois. It has been claimed that the slavery of the "French negroes" and their descendants could not be abolished either by Congress or the State of Illinois, by reason of the stipulation of Virginia in her cession to the United States that the "titles and possessions, rights and liberties" of the inhabitants should be guaranteed. See *Jarrot v. Jarrot* (1845), 2 Gilman, 8-10, with the cases cited where the doctrine is rejected.

<sup>3</sup> Adopted by convention Aug. 26. It refers to *An act to enable the people of the Illinois Territory to form a Constitution and State Government, and for the admission of such State into the Union on an equal footing with the original States*. III.



indenture of any negro or mulatto hereafter made and executed out of this State, or, if made in this State, where the term of service exceeds one year, be of the least validity, except those given in cases of apprenticeship." 2. "No person bound to service or labor in any other State shall be hired to labor in this State, except within the tract reserved for the salt works near Shawnee Town; nor even at that place for a longer period than one year at any one time; nor shall it be allowed there after the year one thousand eight hundred and twenty-five. Any violation of this article shall effect the emancipation of such person from his obligation to service." 3. "Each and every person who has been bound to service by contract or indenture in virtue of the laws of the Illinois Territory heretofore existing and in conformity with the provisions of the same without fraud or collusion, shall be held to a specific performance of their contracts or indentures; and such negroes or mulattoes as have been registered in conformity with the aforesaid laws, shall serve out the time appointed by said laws; provided, however, that the children hereafter born of such persons, negroes or mulattoes, shall become free, the males at the age of twenty-one years, the females at the age of eighteen years. Each and every child born of indentured parents, shall be entered with the clerk of the county in which they reside with their parents, within six months after the birth of said child." Art. VIII. A Bill of Rights declares,—sec. 1. "That *all men* are born equally free and independent, and have certain inherent and indefeasible rights, among which are those of enjoying life and liberty, and," &c. 6. That the right of trial by jury shall remain inviolate. 7. That "the *people* shall be secure in their persons," &c. 8. "That no *freeman* shall be imprisoned or disseized," &c.<sup>1</sup>

Stat. U. S. 428, 6 B. & D. 292. By sec. 2, the line of 42° 30' is made the northern boundary and the territory north of that line, and included in the present State of Wisconsin, is added to the Michigan Territory. 3. Limits suffrage to whites. Resolution, Dec. 3, 1818. *Declaring the admission of the State of Illinois into the Union.* III. Stat. U. S. 536; 6 B. & D. 442. March 3, 1819. *An act to provide for the execution of the laws of the United States within the State of Illinois.* III. Stat. U. S. 502; 6 B. & D. 402.

<sup>1</sup> *Phœbe v. Jay* (1828), Breese, 207:—The act of Indiana Territory of 1807 is void, as being repugnant to the 6th art. of the Ordinance of 1787, but indentures executed under that law are made valid, by the 3d sec. of the 6th art. of the State

**1819**, March 30, Sess. L. p. 354. *An act respecting free negroes, mulattoes, servants, and slaves.* Sec. 1. Black or mulatto person coming to settle, required to produce a certain certificate of freedom. 2. Required to register themselves and families at the clerk's office. 3. Slaves shall not be brought to be here emancipated unless bonds are given. (Amending are acts of 1825, p. 50; 1833, R. S. p. 466, relieving from some penalties.) 4. Resident negroes required to register. 5. Blacks without certificates are not to be employed. 10. Prescribing the treatment of servants by masters. 11. Contracts for service assignable. 12. Punishment of servants guilty of misdemeanors. 13. Redress against masters. 14. Contracts between master and servant, during the time, void. 15, 16. Rights of the parties how settled by the courts. 17. That no negro, mulatto, or Indian shall at any time purchase any servant other than of their own complexion. 18. Prohibits buying and selling of servants without master's consent. 19. Servants punishable by whipping where free persons are by fine. 20. Certificate of freedom at end of service. 21. Passes required. 22-25. Against wandering from their plantations, rioting, assembling, and duties of sheriff, &c. Rev. Laws of 1833, p. 457 (where secs. 6, 7, 8, 9 are omitted).

**1827**, Jan. 6. A criminal code. Division—*Offences relative to slaves, indentured servants, and apprentices.* Sec. 130, against selling liquor to servants or slaves. 149. Punishment for harboring or secreting<sup>1</sup> "a slave or servant owing service or labor to any other persons, whether they reside in this State or any other State or Territory or district within the limits and under the jurisdiction of the United States." 150. Penalty

Constitution; this Constitution being the act of unlimited sovereign power. The acceptance of the Constitution of this State and its admission into the Union by Congress abrogated so much of the ordinance of 1787 as is repugnant to that Constitution. This case is affirmed in *Boon v. Juliet* (1836), 1 Scammon 258; where it is also decided that "the children of registered negroes and mulattoes under the laws of the Territories of Indiana and Illinois are unquestionably free," and in *Choisser v. Hargrave*, ib. 317. In *Sarah v. Borders* (1843), 4 Scam. 347; and *Vincent v. Duncan*, 2 Missouri, 214:—"The Constitution of Illinois cannot be controlled by the Ordinance of 1787."

<sup>1</sup> *Eells v. the People*, 4 Scammon, 498, as to meaning of harboring and secreting. Ib. p. 513, the State had power to pass this law, in the exercise of its police power, so as to include fugitives from other States. In *Chambers v. the People*, ib. 351, the person harbored was a resident negro servant.



for a person, entitled to the services of any negro, &c., under the law of the Territory, disposing of such negro, &c., out of the State. 151. Against publicans trusting minors and slaves. Re-enacted, Rev. Stat. 1845, p. 180.

—, Feb. 2. *An act concerning practice.* Sec. 3. A negro, mulatto, or Indian shall not be a witness in any court against a white person. A person having one-fourth part negro blood shall be adjudged a mulatto. Re-enacted in R. S. of 1845, p. 154, with addition that "every person who shall have one-half Indian blood shall be deemed an Indian."

1829, Jan. 17. *An act respecting free negroes and mulattoes, servants and slaves.* Sec. 1. Requires a bond of negroes coming to settle, and increases the penal character of the law. 2. Provides for the arrest as runaways of negroes without certificates; they shall be hired out by a justice and advertised; if not claimed within a year as fugitive slaves, they shall receive a certificate of freedom.<sup>1</sup> 3. Forbids the intermarriage of "person of color, negro, or mulatto" with white. R. S. of 1856, p. 737. 4. If a slave from another State, coming to hire himself here, shall institute proceedings for freedom, he is to be arrested, if in the judgment of the court he came with that intent, and his master be informed of it.

1831, Feb. 1. Amending the above, requires bonds before coming to the State, and forbids, under penalty, bringing in a slave to emancipate. These acts of 1819, 1829, 1831 appear in the several revisions of 1845, 1856, 1858.

1841.—An act to provide for issuing certificates of freedom to free blacks. Ann. L. p. 189. But such certificates not to be conclusive against a claim of ownership.<sup>2</sup>

1845.—Rev. St. ch. 30, Title *Criminal Jurisprudence*, sec. 56. Declaring whoever "shall forcibly take or arrest any person or persons whatsoever, with a design to take him or her out of this State without having established a claim according

<sup>1</sup> This provision appears to have originated in 1819. See opinion of Treat, Ch. J., in Thornton's case (1849), 11 Illinois, 332, where it is held to be void on the authority of Prigg's case, declaring all State legislation in respect to fugitive slaves void.

<sup>2</sup> In Illinois the presumption of law is that every person is free without regard to color. *Bailey v. Cromwell*, 3 Scam. 71. *Kinney v. Cook*, ib. 232; *Jarrot v. Jarrot*, 2 Gilman, 11.

to the laws of the United States, shall, upon conviction, be deemed guilty of kidnapping," and provides punishment. 57. In like manner designates and punishes the seducing a free colored person out of the State, with intent to sell as a slave. Ch. 74. Title *Negroes and Mulattoes*. A re-enactment of the laws of 1819, 1829, 1831.

**1847.**—A new Constitution. It contains the provisions already cited from the former Constitution. Art. 13. The Bill of Rights. Sec. 6. "That the right of trial by jury shall remain inviolate, and shall extend to all cases at law, without regard to the amount in controversy." 16. "There shall be neither slavery nor involuntary servitude in this State, except as a punishment for crime," &c.

**1853, Feb. 12.**—*An act to prevent the immigration of free negroes into this State.* R. S. of 1856, p. 780. Sec. 1, 2. Fine and imprisonment for bringing slave, for any purpose, into the State. *Proviso.* "That this shall not be construed so as to affect persons or slaves, *bona fide*, traveling through this State from and to any other State in the United States." 3. Misdemeanor for negro or mulatto, bond or free, to come with intention of residing. 4. Such may be prosecuted and fined or sold, for time, for fine and costs. 5, 6, 7. If such do not afterwards remove, increased fine and like proceedings, &c., &c. Appeal allowed to the circuit. 8. If claimed as fugitive slave, after being thus arrested, a justice of the peace, "after hearing the evidence, and being satisfied that the person or persons claiming said negro or mulatto is or are the owner or owners of and entitled to the custody of said negro or mulatto, in accordance with the laws of the United States passed upon this subject," shall give the owner a certificate, after his paying the costs and the negro's unpaid fine, "and the said owner or agent so claiming shall have a right to take and remove said slave out of the State." 9. Punishment of justice for nonfeasance, and of witness falsely accusing negro.

**1855.**<sup>1</sup>—*An act to reclaim persons who have been decoyed or kidnapped and taken away beyond the boundaries of this*

<sup>1</sup> An act of 1827 authorized the governor to deliver up fugitives from justice from other States on being demanded. R. L. of 1833, p. 319, R. S. of 1843, p. 261, R. S. of 1856, p. 589.



*State. An. L. p. 186.* Where persons have been taken as slaves, authorizes the governor to take measures for their restoration.

§ 562. LEGISLATION OF THE STATE OF MICHIGAN.

The territory included within the limits of the present State of Michigan had been part of the Indiana Territory until 1805, when, by the act of January 11, the Territory of Michigan was constituted, having its western limit in a line through the middle of Lake Michigan, northward to the boundary.<sup>1</sup> The law existing in the Territory until that time is indicated in the sketch of Indiana law up to that date.

**1810, Sept. 16.**—A law of the territorial government, consisting of the governor and judges,—*An act to repeal all acts of the Parliament of England, and of the Parliament of Great Britain, within the Territory of Michigan, in the United States of America, and for other purposes.* Michigan Rev. L. of 1827, p. 499. Sec. 1. Repeals the English statutes, with a proviso that "whatever rights may arise under any such statute" shall remain as if this act had not been made; the same being adopted from the laws of one of the original States, to wit, the State of Virginia, as far as necessary and suitable to the circumstances of the Territory of Michigan. 2. Repeals the *coutume de Paris*, or common law of France, and the laws of other governments under which this Territory has heretofore been, saving all rights accruing under them, the act "being adopted from the laws of one of the original States, to wit, the State of Vermont," as far as necessary," &c.

<sup>1</sup> See *ante*, p. 123, n. 3.

<sup>2</sup> This phraseology was in view of the power of the governor and judges to adopt "such laws of the original States, criminal and civil, as may be necessary and best suited to the circumstances of the District, and report them to Congress, which laws shall be in force in the District until the organization of the General Assembly, therein, unless disapproved of by Congress," &c., as provided in the Ordinance of 1787. Vermont could not with propriety be called one of the original States. I have not been able to find any statute of that State repealing the French law, nor to ascertain whether it was ever pretended there that the law of France had any force therein, though it might perhaps have been taken to operate as a personal law in some case of persons who had come from Canada. The law of Vermont thus adopted may have been that of March 8, 1787, adopting the common and statute law of England as the general rule of decision, which was repealed by act of Nov. 10, 1787. Another of Nov. 4, 1797, adopted the common law so far as applicable. See *ante*, p. 38. In *Laws of Michigan*, printed, Washington, D. C., 1806, see letter of May 8, 1806, of A. B. Woodward, Chief Justice of the Territory, to Mr. Madison, Secretary of State, on the construction of the act constituting the government by the governor and judges.

**1815.**—An act for the punishment of crimes. (Laws printed in 1816, Detroit.) Sec. 45. Against kidnapping, provides that this shall not prevent "any master or mistress who may remove from this Territory to another State or Territory of the United States from taking, with him or her, his or her servants." 59. That corporal punishment, not extending to life or limb, may, at the discretion of the court, be inflicted on "any negro, Indian, or mulatto slave who shall be convicted of any offence not punishable with death."

**1827,**<sup>1</sup> Apr. 12.—An act respecting crimes. Sec. 47. Declares "that if any person shall kidnap or steal or forcibly take away any man, woman, or child, bond or free," &c., shall, &c. R. S. of 1838, p. 623.<sup>2</sup>

—, Apr. 13.—*An act to regulate blacks and mulattoes, and to prevent the kidnapping of such persons.* Revision of 1827, p. 484. Sec. 1. Black or mulatto coming into the State required to produce a certificate of freedom before being permitted to reside, which, by sec. 4, is to be recorded. 2. Resident blacks are to be registered, and have certificates of freedom. 3. "That if any persons shall harbor or secrete any black or mulatto person, the property of any person whatever, or shall in any wise hinder or prevent the lawful owner from retaking and possessing his or her black or mulatto servant or servants, such person shall, upon conviction thereof before any justice of the peace in the county, be fined in sum," &c. 4. For recording colored immigrant's certificate. 5. That in case any person or persons, his or their agent or agents, claiming any black or mulatto person that now is or hereafter may be in this Territory, may apply to any justice of the county court or justice of the peace, and shall make satisfactory proof that such black or mulatto person or persons is or are the property of him or her who applies, or for whom application is

<sup>1</sup> In 1818 the Territory included in the present State of Wisconsin was added to Michigan Territory by act of Congress. (*Ante*, p. 132, n. 3.) The law of this portion has been indicated in the sketch of the law of Illinois, up to this date. See in III. Stat. U. S. 482, the note containing list of acts relating to the Michigan Territory.

<sup>2</sup> An act of the territorial legislature, March 12, 1827, authorizes the governor to deliver up fugitives from justice demanded by States from which they fled. See in R. S. of 1838, p. 673, and R. S. of 1849, p. 710, provisions authorizing the governor of the State to surrender in such case.



made, the said judge or justice is hereby empowered and required by his precept to direct the sheriff or constable to arrest such black or mulatto person or persons, and deliver the same to the claimant or claimants, his or their agent or agents, for which service," &c. 6. Immigrant black, &c., to give security. 7, 8. Penalties, &c. 9. "That if any person or persons, under any pretences whatever, shall by violence, fraud, or deception, seize upon any free black or mulatto person within this Territory, and keep or detain such free black or mulatto person in any kind of restraint or confinement, with intent to transport such free black or mulatto person out of this Territory contrary to law, or shall in any manner attempt to carry out of the Territory any black or mulatto person, without having first taken such black or mulatto person before some judge of the circuit or county court, or a justice of the peace of the county wherein such black or mulatto person was taken, agreeably to the provisions of the act of Congress in such case made and provided, and there prove his right to such black or mulatto person, every such person so offending shall be deemed guilty of a misdemeanor," &c., &c. In the more general provision, R. S. of 1838, Part I. Tit. I. c. 3, § 17, no reference is made to the act of Congress.

**1835.**<sup>1</sup>—Constitution of the State of Michigan.<sup>2</sup> In Art. I.,

<sup>1</sup> 1834, June 28. By act of Congress of this date, the territory west of the Mississippi, bounded north by the northern boundary of the United States, on the southwest and west by the Missouri and White Earth rivers, and south by the State of Missouri, was declared, "for the purpose of temporary government, attached to and made part of the Territory of Michigan; and the inhabitants therein shall be entitled to the same privileges and immunities, and be subject to the same laws, rules, and regulations in all respects as other citizens of Michigan Territory." IV. Stat. U. S. 701, 9 B. & D. 79.

<sup>2</sup> It begins:—"In convention, begun at the city of Detroit, on the second Monday of May, in the year one thousand eight hundred and thirty-five: We, the people of the Territory of Michigan, as established by the act of Congress of the eleventh of January, eighteen hundred and five, in conformity to the fifth article of the Ordinance providing for the government of the territory of the United States northwest of the River Ohio, believing that the time has arrived when our present political condition ought to cease, and the right of self-government be asserted; and availing ourselves of the aforesaid Ordinance of the Congress of the United States, of the thirteenth day of July, seventeen hundred and eighty-seven, and the acts of Congress passed in accordance therewith which entitled us to admission into the Union upon a condition which has been fulfilled, do, by our delegates in convention assembled, mutually agree to form ourselves into a free and independent State, by the style and title of the State of Michigan, and do ordain and establish the following Constitution for the government of the same."

The act of Congress, June 15, 1836; *An act to establish the northern boundary*

the Bill of Rights, there is no attribution of liberty as natural, inherent, inalienable. Art. II. sec. 1. Limits the elective franchise to whites. Art. XI. "Neither slavery nor involuntary servitude shall ever be introduced into this State, except for the punishment of crimes of which the party shall have been duly convicted."

**1838.**—In Rev. Stat. p. 334, "No white person shall intermarry with a negro or mulatto." (R. S. of 1846, p. 330.) Ibid. p. 623;—punishment for kidnapping, "to send out of the State against his will, or in any way hold to service against his will." R. S. of 1846, p. 661.

**1855.**—*An act to protect the Rights and Liberties of the people of this State.* Ann. Laws, p. 413. Compiled Laws of 1857, p. 1498. Sec. 1. "Whenever any inhabitant of this State is arrested or claimed as a fugitive slave," the prosecuting attorneys of the county shall "use all lawful means to protect and defend every such person." 2. "All persons so arrested and claimed as fugitive slaves shall be entitled to all the benefits of the writ of habeas corpus and of trial by jury." 3. Appeal allowed on the habeas corpus. 4. The court "may and shall, on application of either party," direct a trial by jury. 5. The person claimed shall not be imprisoned in the State's jails. 6. Falsely charging a free person with being a fugitive slave, &c., to be punished with imprisonment, not less than three years. 7. Wrongfully seizing free person with intent, &c., punishable by fine and five years' imprisonment. 8. That in cases under the last two sections the proof of slavery shall require two witnesses. 9. No claim of a person as apprentice is within this act. 10. Repeals conflicting acts.

*line of the State of Ohio, and to provide for the admission of the State of Michigan into the Union upon the conditions therein expressed.* V. Stat. U. S. 49. Sec. 2, declared "That the Constitution and State government which the people of Michigan have formed for themselves be, and the same is hereby accepted, ratified, and confirmed; and that the said State of Michigan shall be and is hereby declared to be one of the United States of America, and is hereby admitted into the Union upon an equal footing with the original States, in all respects whatsoever." Proviso as to boundaries. July 1, 1836. *An act to provide for the due execution of the laws of the United States within the State of Michigan.* V. Stat. U. S. 62; 9 B. & D. 431. The act Jan. 26, 1837. *An act to admit the State of Michigan into the Union upon an equal footing with the original States,* V. Stat. U. S. 144; 9 B. & D. 588, reciting that a convention of delegates had assented to the above act, declares the State to be admitted.



— *An act to prohibit the use of the common jails and other public buildings in the several counties for the detention of persons claimed as fugitive slaves.* Ann. L. p. 415. Compiled Laws of 1857, p. 1456.

**1859**, Feb. 15. An act amending sec. 25 of ch. 153 of R. S. of 1846, or sec. 5735 of the Compiled Laws relating to kidnapping, by adding, "or who shall bring any negro or mulatto or other person into the State, claiming him or her as a slave, shall be punished by imprisonment in the State prison not more than ten years or by fine not exceeding one thousand dollars."

§ 563. LEGISLATION OF THE STATE OF WISCONSIN.

The territory included in the present State of Wisconsin had been part of the Michigan Territory from 1818 until the admission of the State of Michigan in 1836.<sup>1</sup>

By section 12 of the act organizing the Territory of Wisconsin<sup>2</sup> the inhabitants are guaranteed all the "rights, privileges and advantages" secured to the people of the Northwest Territory by the Ordinance of 1787, and all the rights, &c., secured to the people of Michigan Territory; the laws of that Territory are extended over the new territory, subject to repeal by the legislature of the new territory, and the laws of the United States are extended in the same. Sec. 5. Limits the elective franchise to free whites for the first election, but the qualifications of voters thereafter shall be fixed by the local legislature, provided "that the right of suffrage shall be exercised only by citizens of the United States."

**1839**.—Statutes of the Territory, p. 349. In the criminal code a provision against kidnapping or unlawfully carrying away to sell as a slave, and against selling any such as a slave. R. S. of 1849, p. 686; R. S. of 1858, p. 933.

**1848**.—Constitution of Wisconsin.<sup>3</sup> Art. I. sec. 1, declares

<sup>1</sup> See the notes on page 139.

<sup>2</sup> Act of April 30, 1836, V. Stat. U. S. 10; 9 B. & D. 316. Sec. 1, describes the territory as lying on both sides of the Mississippi river. (See *ante*, p. 139, n. 1.) Sec. 6, defines the legislative power, and provides that "all the laws of the governor and legislative assembly shall be submitted to, and if disapproved by the Congress of the United States the same shall be null and void." This provision reaffirmed in an act amending the above, March 3, 1839. V. Stat. U. S. 356; 9 B. & D. 1023.

<sup>3</sup> Aug. 6, 1846. *An act to enable the people of Wisconsin Territory to form a Constitution and State Government, and for the admission of such State into the*

that all men are born equally free and have certain inherent rights, &c. 2. There shall be neither slavery nor involuntary servitude, otherwise, &c. Art. II. sec. 1, limits the suffrage to whites and certain classes of Indians.

**1858.**—Revised Statutes, ch. 158, *Of the writ of habeas corpus*. Sec. 51–61, relate to fugitive slaves. The district attorneys required to “use all lawful means to protect, defend, and procure to be discharged every person arrested or claimed as a fugitive slave.” The application of such district attorney for the writ shall be sufficient cause of issuing it. All public officers shall give notice to the district attorney of such cases. If not discharged on the return of the writ the person claimed may have an appeal to the next court, where a trial by jury shall be had, the costs of the party claimed being chargeable on the State. Fine and imprisonment for representing a free person to be a slave. Two witnesses required to prove a person to be a slave—depositions not received. No judgment recovered against any person for a neglect or refusal to obey, or for any violations of the act of Congress commonly termed the “fugitive-slave act, approved Sep. 18, 1850,” shall be a lien on real estate, or be enforceable by execution on real or personal property.

§ 564. LEGISLATION OF THE STATE OF MISSISSIPPI.

**1798**, April 7: The third section of an act of Congress entitled *An act for an amicable settlement of the limits with the State of Georgia, and authorizing the establishment of a government in the Mississippi Territory*. I. Stat. U. S. 549; 3 B. & D. 39,<sup>2</sup> contains an implied recognition of slavery. The

*Union*. IX. Stat. U. S. 56. Mar. 3, 1847, May 29, 1848, acts for the admission of the State into the Union. IX. Stat. U. S. 178, 233.

<sup>1</sup> Provisions empowering the governor to deliver up fugitives from justice demanded under the Constitution, are found in R. S. of 1849, p. 715. R. S. of 1858, p. 980.

<sup>2</sup> The Territory was separated from the Gulf of Mexico by the Floridas. The boundary fixed by the treaty of 1783, beginning at the Mississippi River at 31° N. L., running thence east to the Chattahoochee, and from its junction with the Flint River east to the St. Mary's and the Atlantic. VIII. Stat. U. S. 55. The Territory was claimed by South Carolina under colonial patents, and by Georgia under the king's proclamation, Oct. 17, 1763. The cession by South Carolina was Aug. 9, 1787; that of Georgia, April 24, 1802. 1 B. & D. 445, 486. In the act the Chattahoochee is called the eastern boundary. Sec. 3. Authorizes the Presi-



sixth declares "that the people of the aforesaid Territory shall be entitled to and enjoy all and singular the rights, privileges, and advantages granted to" the people of the Northwest Territory.<sup>1</sup> The seventh declares "that from and after the establishment of the aforesaid government it shall not be lawful for any person or persons to import or bring into the said Mississippi Territory from any port or place without the limits of the United States, or cause or procure to be so imported or brought, or knowingly to aid or assist in so importing or bringing any slave or slaves, and that every person," &c. [penalty]; "and that every slave so imported or brought shall thereupon become entitled to and receive his or her freedom."<sup>2</sup>

1805, Mar. 6. *An act respecting slaves.* Toulmin's Mississippi Ter. Dig. (1807), 378; Toulmin's Ala. Dig. of 1823, 627, contains the police regulations, disqualifications of slaves, &c., common in the older States, though not so severe in respect to "outlying slaves." Sec. 16, reciting, "Whereas it has been the humane policy of all civilized nations, where slavery has been permitted, to protect this useful but degraded class of men from cruelty and oppression," enacts "that no cruel or unusual punishment shall be inflicted on any slave within this Territory." By an amending act, in 1807, the police regulations are more severe.

—, July 20. An act that slaves be emancipated only for meritorious services on application to the legislature, and security given.<sup>3</sup> Sec. 2. Slaves claiming freedom, how to proceed

dent to establish therein a government in all respects similar to that now exercised in the Territory northwest of the River Ohio, excepting the 6th art. of the Ordinance of 1787. See in 3 Hildr. 2d series, 182, the debate, March 23, 1798, in House of Representatives, on this matter. A supplemental act, May 10, 1800, modified the organization of the local general assembly. II. St. U. S. 69; also, acts of Jan. 9, 1808; II. Stat. U. S. 455; and Oct. 25, 1814, extending the right of suffrage and enlarging the legislative council.

<sup>1</sup> *State v. Cawood*, 2 Stew. 362. Congress designed to make the common law of England, so far as applicable, the rule of action in proceedings civil and criminal.

<sup>2</sup> See Am. State Papers, Misc. I. p. 213. Resolution reported in House of Representatives that the governor of Mississippi be authorized by special license to allow residents in the Territory, who were citizens of the United States when the national government was extended over it, to bring in slaves. Also, *Ib.* p. 451, another in the same body, respecting the importation of slaves into the Territory which had been brought into the United States from abroad.

<sup>3</sup> The annual laws of Alabama contain many acts thus emancipating slaves therein mentioned.

before county court; masters to give bond, if in possession; the slave, if out of possession of a claimant. Toul. Miss. Dig. 259; Toul. Ala. Dig. 632.

**1807**, Feb. 10. *Of crimes, &c.* Sec. 58. "No person having an interest in a slave shall sit upon the trial of such slave." 59. In slave cases the court may take such testimony of bond and free negroes, &c., "with pregnant circumstances as to them shall seem convincing." Turner's M. T. Dig. 223.

**1808**, Mar. 1. An act to regulate the introduction of slaves from other parts of the United States. Toulmin's Alabama Dig. (1823), 633; Turner's M. T. Dig. 386.

**1809**, Dec. 5. Dec. 22. Law of patrol, and relating to sale and redemption of runaway slaves committed to jail. An act, Dec. 18, 1812, makes the patrol law more stringent. Toul. Ala. D. 634, 635.

**1812**,<sup>1</sup> Dec. 21. Provides a summary trial for slaves. Toul. Ala. Dig. 183. Amended by act Jan. 15, 1814. Ibid. Enlarging powers of justices of the peace in trials for offences not capital. Sec. 6. Makes capital offence the attempt to commit a rape on or to maim a free white.

**1815**, Dec. 8. Slaves imported contrary to the laws of the United States to be libeled and sold. Toul. Ala. Dig. 637.

—, Dec. 19. Amending act of 1805, July 20; vests jurisdiction over claims for freedom in the superior instead of the county courts. Ibid. 638.

**1816**, Nov. 27. Regulating taverns, &c., prohibits sale of liquors by free negroes. Toul. Ala. Dig. 638.

**1817**, Aug. 15. Constitution of the State of Mississippi.<sup>2</sup>

<sup>1</sup> On the 17th Jan., 1811, Congress resolved in favor of the temporary occupation of Florida, then held by Spain, and passed an Act to enable the President of the United States, under certain contingencies, to take possession of the country lying east of the River Perdido, and south of the State of Georgia and the Mississippi Territory, and for other purposes. III. Stat. U. S. 471. It provided that in case of possession the President be authorized to establish within the Territory a temporary government, and the military, civil, and judicial powers thereof shall be vested and exercised as he might direct for the protection and maintenance of the inhabitants in the full enjoyment of their liberty, property and religion. The portion of Territory lying between the boundary of Louisiana and the River Perdido was occupied, and by Act of May 14, 1812, II. Stat. U. S. 734, that portion between the Pearl and the Perdido was united to the Mississippi Territory. The whole of Florida was ceded by Spain Feb. 22, 1819.

<sup>2</sup> June 17, 1812. Resolve, requesting the State of Georgia to assent to the formation of two States in the Mississippi Territory. II. Stat. U. S. 786; 6 B. & D.



Declares "all freemen, when they form a social compact, are equal in rights," &c., that "all political power is inherent in the people," &c.<sup>1</sup> By some clauses the privileges of private persons are described as rights of the people, in others as "of citizens." In some, "no person shall be," &c. The right of suffrage is limited to free white male persons.

**1818.** 1st Ses. p. 70. A police act for Natchez, sec. 7, requires separate burial places for whites and for "slaves or colored persons." 8. Forbids burial of any "white person" without a physician's certificate and publication. An Act to prevent slaves from raising cotton for their own benefit: owner to forfeit fifty dollars in such case. *Ib.* p. 168.

**1819,** 2d Ses. p. 4. Amending 1808, March 1, respecting importation of slaves. Sec. 1, 2. Requiring proof that slaves imported have not committed certain crimes. 3. Imposes a tax of twenty dollars on slaves brought in "for sale or as merchandise." 5. This is not applicable to persons residing in, and bringing slaves from other parts of the United States for their

481. March 1, 1817. *An act to enable the people of the western part of the Mississippi Territory to form a Constitution and State Government and for the admission of such State into the Union, &c.* III. St. U. S. 348; 6 B. & D. 175. Dec. 10, 1817, Resolution for the admission of the State. III. Stat. U. S. 472; 6 B. & D. 356. Recites that the Constitution is republican and in conformity to the Ordinance of 1787, so far as applicable.

<sup>1</sup> In the preamble, "We the representatives of the people inhabiting," &c., referring to the enabling Act of Congress, "do ordain," &c., "and do mutually agree with each other to form ourselves into a free and independent State by the name," &c. In the Constitution of 1832:—"We declare," &c., is used, without indicating the persons indicated. An act of Dec. 16, 1831, for holding a convention, recited that the electors had voted for a convention in conformity with a resolution of the legislature, Dec. 15, 1830. The same Constitution provides that amendments proposed by two thirds of the legislature may be adopted by a majority vote of the qualified electors. Art. 6. Titled—*Slaves*. 1. That the legislature shall have no power to pass laws for the emancipation of slaves without consent of the owners, unless for meritorious services, the owner then to be compensated; they "shall have no power to prevent emigrants to this State from bringing with them such persons as are deemed slaves by the laws of any one of the United States, so long as any person of the same age or description shall be continued in slavery by the laws of this State; provided, that such person or slave be the bona fide property of such emigrants, and that laws may be passed to prevent the introduction into the State of slaves who may have committed high crimes in other States; they shall have power to pass laws to prevent the owners of slaves to emancipate them saving the rights of creditors and preventing them from becoming a public charge; they shall have full power to permit slaves from being brought into this State as merchandise, and also to oblige the owners to treat them with humanity," &c. In the prosecution of slaves, grand jury inquest shall be necessary and the legislature shall have no power to deprive them of an impartial trial by a petit jury.

own use, except from Louisiana or the Alabama Territory. 12. "It shall not be lawful for any free negro or mulatto to emigrate to and become a resident of this State." Such person, neglecting to leave the State on notice, may be sold. (Hutch. D. 524.) —, p. 70. *To provide for the safe keeping of runaway negroes, taken up within the Indian nations in this State.* —, p. 72. *To amend County Court law*, gives these courts exclusive jurisdiction in capital offences committed by slaves. Provides for jury, counsel, and evidence.

**1820.**—3d Ses. c. 33. *To authorize justices of the peace to punish slaves and free persons of color for certain offences.* Sec. 1. A justice and two freeholders, "who shall be owners of slaves," may punish, by whipping and pillory, any slave or free person of color who shall assault, &c., any white, or "use insolent or abusive language without provocation" to any white. 2, 3. Respecting sales by slaves, &c. —, c. 45. Punishment of crime, &c. Sec. 7. "Any person guilty of stealing or selling any free person for a slave, knowing the said person so sold to be free," shall suffer death on conviction. (Hutch. D. 938.) 8. Felony punishable with death to steal any slave. 49. What persons, unable to pay fines and costs, are to be hired out, "liable and subjected to all the duties of a laboring servant,"—a provision repealed, 1821, 4th Sess., c. 51.

**1822**, June 18. *An act to reduce into one the several acts concerning slaves, free negroes, and mulattoes.* Sec. 1. "All persons lawfully held to service for life, and the descendants of the females of them within this State, and such persons and their descendants as hereafter may be brought into this State, pursuant to law, being held to service for life by the laws of the State or Territory from whence they were removed, and no other person or persons whatsoever shall henceforth be deemed slaves." 2-7. Allows the introduction of slaves born in other parts of the United States, not convicted of crimes, &c. Providing penalties, &c.<sup>1</sup> 76. Remedy for persons conceiving themselves unlawfully held. 78. Penalty on persons

<sup>1</sup> In *Harris v. Runnels*, 12 Howard U. S. Rep. 79, held, that this statute does not make void a note given for the price of slaves to be imported contrary to this law. See the State law, 1837, May 13, sec. 2, 3.



aiding in the prosecution of a suit for freedom, in case the plaintiff fails to establish his claim. 79. Members of emancipation societies not permitted to be jurors in such suit. 80-86. Against immigration of free negroes; registry of such persons, &c. The other provisions are re-enactments, or such as conform the law to the general system of the older States. See Hutchinson's D. ed. 1848, pp. 512-525.

The above act is enlarged and amended by acts of June 26, 1822, on patrol law; Jan. 16, 1823, containing severer rules against assemblies of slaves, and enlarging powers of justices, &c.; Jan. 23, 1824; Jan. 29, 1825; Jan. 29, 1829. The act of Dec. 30, 1831, Sec. 1, requires all free negroes between sixteen and fifteen years of age to quit the State, or be sold for five years. *Proviso*, that negroes proving "good character and honest deportment" may have licenses to remain. 2. Forbids employment of free negroes or mulattoes on boats, unless so licensed. 6. Colored persons may not exercise the functions of a minister of the gospel; but a master may on his own premises permit a slave of his own to preach to his other slaves.<sup>1</sup> (Hutch. D. 533.) The acts of 1831, Dec. 19; 1833, Dec. 25; 1839, c. 59, contain additional amendments. See Hutch. D. 526-539.

**1830.**—*An act to prevent the circulation of seditious pamphlets.* Sec. 1. White persons, for this offence, punishable with fine and imprisonment. 2. Colored persons, for the same, with death. 3. No colored person to be employed in printing offices. 4. Not lawful for slave or person of color to keep house of entertainment. 5. Justices and constables, duty to search into, &c. (Hutch. D. 949.)

**1832,** Oct. 26. A revised Constitution.<sup>2</sup>

<sup>1</sup> *Jordan v. The State*, 32 Mississippi, 382. A slave, except on his master's plantation, cannot be employed to arrest a runaway slave.

<sup>2</sup> See ante, p. 145, note. Under *Slaves*, an Article corresponding to one in the older Constitution, omitting, in Sec. 1, "they shall have full power to prevent slaves from being brought into this State as merchandise." Sec. 2. "The introduction of slaves into this State as merchandise, or for sale, shall be prohibited from and after the first day of May, 1833. *Provided*, that the actual settler or settlers shall not be prohibited from purchasing slaves in any State in this Union, and bringing them into this State for their own individual use, until the year 1845." Sec. 3. That all proceedings in prosecution of slaves for crimes shall be regulated by law (*i. e.* statute). No guarantee of jury trial as before.

In *Groves v. Slaughter* (1841), 15 Peters, 449, held, that the second section is

**1837, May 13.**—*An act to prohibit the introduction of slaves into this State as merchandise, or for sale.* Declares penalties; and that notes, &c., given for such slaves are void. (Hutch. 535.) Repealed by act of 1846, ib. 541.

**1839.**—A new criminal Code. Title iv., sec. 64. *Stealing slaves.* Every person who shall be guilty of stealing "any slave or slaves, the property of another, with or without the consent of such slaves," is declared punishable with ten years' imprisonment. (Hutch. D. 970.) Title vii. *Of exciting insurrections,* refers only to insurrection of slaves "with arms, in the intent to regain their liberty by force." Exciting discontent is recognized as a distinct offence of less degree. Also, the circulating documents, &c. (Hutch. D. 978.) By the same Code free persons of color are declared triable and punishable by this Code as whites; but it does not extend to slaves. (Hutch. D. 994.)

**1842, Feb. 26.** An amending act relating to *free negroes and mulattoes.* (Hutch. D. 537.) Sec. 1. Proceedings to be had against those unlawfully in the State. 2. That slaves taken from this State and emancipated may not return.<sup>1</sup> 3. Free negroes

merely directory to the legislature, and not operative *proprio vigore* as a prohibition. Mr. Clay and Mr. Webster, of counsel, against the operation of the State Constitution, contended that it was in conflict with that of the United States, giving Congress power to regulate commerce between the States (Ib. 488, 494). The court concluded that "this point was not involved." (Ib. 504, 508). The opinion of the court, by Thompson, J., does not refer to it. McLean, J., delivered an opinion against the idea of a conflict, based on the proposition that slaves are not property. Chief Justice Taney likewise denied the existence of any conflict, without discussing the question of "property or persons." Story, Thompson, Wayne, McKinley, Justices, concurred that there was no conflict. Baldwin, J., held that the conflict existed, and that slaves are property, as recognized by the Constitution of the United States. Judges McKinley and Story dissented from the judgment of the court; that is, held that the State Constitution should be taken to act of itself, as private law. Judges Catron and Barbour did not participate in the decision of the case.

By an amendment to the Constitution, adopted Feb. 2, 1846, "The legislature shall have and are hereby vested with power to pass such laws regulating or prohibiting the introduction of slaves into this State as may be deemed proper and expedient."

<sup>1</sup> This appears to have been law, either common or statute, before. See Hinds v. Brazeale (1838), 2 Howard's Miss. 837, where the testator, in 1826, had left his residence in Mississippi, with a negro woman and the defendant, his son by this woman; had emancipated them in Ohio by deed which in his will he recited, devising all his property to defendant, whom he acknowledged to be his son; by the highest court, Sharkey, Ch. J., defendant was held a slave, who, with the property devised, belonged to the heirs at law. As to the effect of the intention of the owner who carries his slaves into another State, and there emancipates, see Shaw

Brown (1858), 35 Mississippi, 247. In this case it was also held by the court,



or mulattoes may not emigrate to this State. 4. Captains of vessels introducing such made liable to fine and imprisonment. 5-10. Providing for the sale of such negroes, &c., and for a particular supervision over them afterwards. 11. "Hereafter" it shall not be lawful for any person, by last will or testament, to make any devise or bequest of any slave or slaves for the purpose of emancipation, or to direct that any slave or slaves shall be removed from this State for the purpose of emancipation elsewhere." (The Code of 1857, art. 9, p. 236, contains a more stringent provision, to prevent evasion of the law before practiced, given in 37 Mississippi, 255.) Later amending acts, not important in the view here taken, are given in Hutchinson's Digest of the State law, ed. 1848, pp. 540-542.

**1846.**—An act giving half the value to the owners of slaves executed. By an act of 1848, non-resident owners are not to receive compensation. (Hutch. D. 540, 542.)

**1854, c. 36.** An act regulating the trial of slaves for offences not capital. Provides for examination by two magistrates and five slaveholders, with appeal by the owner to the circuit court.<sup>2</sup>

**1857.**—A new Code.<sup>3</sup>

Handy, J., that a negro from another State may, on the principle of comity, take by devise in Mississippi. But in *Hearn v. Bridault* (1859), 37 Miss. 209, *Cap.* "It is the policy of this State to interdict all intercourse, commerce, and comity with this race, and to enforce against them the strictest rule of the ancient law applicable to alien enemies, except as to life and limb. Alien free negroes, being without the protection of the Federal Constitution, as citizens of the United States, and being of a barbarian race, with whom civilized nations have no commercial, social, or diplomatic intercourse, and hence regarded as perpetual enemies (though no war be waged against them), are incapable of taking or holding any species of property in this State." Similar views are set forth in *Mitchell v. Wells*, ib. 235. These two cases are particularly interesting as illustrations of that theory in international law by which the court determines the relations of private persons by its own views of what is due to and from the State and other States in reference to some particular class of interests—the doctrine of "comity," as commonly understood. In each case Harris, J., delivered the opinion of the court, and Handy, J., dissented.

<sup>1</sup> It had been held in *Ross v. Verner* (1840), 5 Howard's Mississippi R., that a direction to executor to send slaves to Liberia, there to remain free, was a valid trust; that it was not against the policy of the State for the owner to send slaves out of the State for manumission. Bequest of slaves to trustees, in trust for the American Colonization Society, was held void in *Lusk v. Lewis* (1856), 32 Miss. 297.

<sup>2</sup> But a slave may also be indicted and tried in the circuit court. *Jordan v. The State*, 32 Miss. 382.

<sup>3</sup> This I have not seen. Judging by the current of judicial decisions its provisions do not probably lighten the bonds of the negro race in this State. A State Convention, Jan. 12, 1861, passes a so-called *Ordinance of Secession*, similar to



## § 565. LEGISLATION OF THE STATE OF ALABAMA.

On the admission of the State of Mississippi, in 1817, the eastern portion of the former Territory was organized as the Alabama Territory, in which the laws of Mississippi Territory continued.<sup>1</sup> No statutes affecting personal condition were enacted during the brief existence of the territorial government.

**1819, Aug. 2.** Constitution of the State adopted.<sup>2</sup>

The declaration as to personal rights, and the sixth article on the powers of the legislature in respect to slaves are substantially the same as those of the Constitution of Mississippi of 1817;<sup>3</sup> suffrage is limited to "white male persons." Sec. 3 of art. 6, provides that "any person who shall maliciously dismember or deprive a slave of life shall suffer such punishment as would be inflicted in case the like offence had been committed on a free white person, and on like proof, except in case of insurrection of such slave."

**1819.**—An act increasing the stringency of patrol law, Toulman's Ala. Dig. 639. See Code, §§ 983-1004.

**1822.**—An act to prevent free negroes retailing liquors, Toul. Al. D. 642; Code, §§ 1036, 1037.

**1823.**—An act to carry into effect the laws of the United States prohibiting the slave trade. Slaves imported shall be employed on public works or sold for the State. Toul. Al. D. 643. Modified in Code, §§ 2056-2063.

**1824.**—An act for payment of residents being owners of slaves executed, except in case of insurrection. Modified in Code, §§ 3327, 3328.

that of South Carolina and Alabama. A similar Ordinance was passed by Georgia, Jan. 19, 1861, since printing the abstract of the laws of that State in this volume.

<sup>1</sup> Mar. 3, 1817. *An act to establish a separate government for the eastern part of the Mississippi Territory*, III. Stat. U. S. 371. 6 B. & D. 209, provides for appointment of a governor and secretary by the President, with the consent of the Senate, and for a legislative council and assembly like that of the older Territory.

<sup>2</sup> Beginning, "We, the people of the Alabama Territory," &c., referring to the act of Mar. 2, 1819, to enable the people of the Alabama Territory to form a Constitution and State government and for the admission of such State into the Union on an equal footing with the original States, III. Stat. U. S. 489, 6 B. & D. 380. A Resolution, of Dec. 14, 1819, declaring the admission of the State of Alabama into the Union, recites that the people of the Territory, by a convention, had formed for themselves a Constitution and State government which is republican and in conformity with the principles of the articles of compact, i.e., the Ordinance of 1787, so far as applicable. III. Stat. U. S. 608, 6 P. & D. 554.

<sup>3</sup> See *ante*, p. 145.

**1826**, Jan. 2. An act against trading with slaves. Code, § 3285. —, Jan. 14. Circuit judges authorized to hold court at their discretion for trial of slaves. Another act, Jan 7, 1832, for more speedy trial of slaves and free persons of color. See Code, § 3319. —, Dec. 20. Slaves and free persons of color for manslaughter on the body of another such, to be punished by whipping and branding. Ib. § 3314.

**1827**, Jan. 13. *An act to prohibit the importation of slaves for sale or hire.* Citizens of the State may purchase for their own use. This act is repealed by act of Jan. 22, 1829. An. L. p. 63.

**1831**, Jan. 31. Slaves or free persons of color, for attempt to commit rape, to suffer death. Code, § 3307.

**1832**, Jan. 16. *An act to prevent the introduction of slaves into Alabama, and for other purposes.* An. L. p. 12. Sections 1-8, 20, 21, relating to importation, are repealed by act of Dec. 4, of the same year. Ann. L. p. 5. Sec. 9. That it shall not be lawful for any free person of color to settle within the limits of this State; such, attempting settlement, declared punishable by whipping, and on further stay may be sold for life (changed in Code, § 1033, to imprisonment). 10. Prohibits, under fine, the attempt to teach any slave or free person of color to spell, read, or write. 10-24. Penalties for negroes writing passes; free blacks forbidden to associate or trade with slaves; more than five male slaves make an unlawful assembly; slaves may attend worship conducted by whites; slaves or free negroes may not preach, &c., to slaves, &c., unless before five respectable slaveholders, and the negroes so preaching, &c., to be licensed by some neighboring religious society. Clay's Al. D. p. 398. Code, §§ 1035, 1036, 1044. Code, § 1037, reads, "The preceding sections of this article do not apply to or affect any free person of color who, by the treaty between the United States and Spain, became a citizen of the United States, or the descendants of such."

**1834**, Jan. 17. County courts may authorize owners for meritorious causes to emancipate, *provided* that the emancipated shall remove out of the State, "never more to return," &c. Code, §§ 2044-2048.

**1835**, Jan. 7. Against selling poisons to slaves, Code, § 3278. —, Jan. 9. In a penal law, "slaves shall be competent witnesses where free persons of color are charged," &c. Comp. Code, § 2276.

**1839**, Jan. 10. An act making persons, not being patrol or owner or agent, &c., who may assault slaves, "without just cause," liable to punishment as in assault on whites. Modified in Code, § 3300. —, Feb. 2. *An act the more effectually to prevent free negroes and persons of color from entering into and remaining in this State.* Sec. 6, 7. Repealed by act of 1840, No. 26, and further amended by act of 1841, No. 9, as to the city of Mobile, making it the duty of masters of vessels to report and of the Mayor to arrest free negroes. The other provisions appear to be included in penal Code of 1841, c. 15, § 21. *On slaves, &c.*, Clay's D. p. 473, and see Code, Title *Free colored mariners*, providing for the imprisonment of such mariners and for punishment of captains neglecting to carry them away, by fine and imprisonment; bonds required. Code, §§ 1033, 1045-1051.

**1843-4**.—No. 38. Declares enticing away slave either for use or "to enable such slave to reach some other State or country where such slave may enjoy freedom," punishable by imprisonment for not less than ten years. Code, § 3128.

**1844-5**.—No. 222. Against trading with slaves at boats, &c.

**1849-50**.—Nos. 14, 17. To suppress trading with slaves. No. 15. Against slaves selling spirituous liquors. Code, §§ 3281-3283. No. 18. Slaves, except for capital offences, may be bailed. Ib. § 3332. No. 19. For greater accuracy in commitment of absconding slaves. Ib. §§ 1023-1032.

**1851-2**.—Nos. 74, 75. Forbid sale of liquors to, and authorizing appointment of guardians for free persons of color. No. 414. Declares certain persons "citizens of this State as fully as they would be if they were not of Indian descent."

**1852**, Feb. 2. A Code containing the earlier provisions and resembling in substance the Codes of the older States. Sec. 2042:—"The state or condition of negro or African slavery is established by law in this State, conferring on the master prop-



erty in and the right to the time, labor, and services of the slave and to enforce obedience on the part of the slave to all his lawful commands. This authority he may delegate to another." 2043. "The master must treat his slave with humanity and must not inflict upon him any cruel punishment; he must provide him with a sufficiency of healthy food and necessary clothing; cause him to be properly attended in sickness and provide for his necessary wants in old age." 2052. Bond for costs required, on the part of the slave claiming freedom. 2056. Children under ten years of age not to be sold, under execution, without the mother nor the mother without the children, unless one of the parties in interest makes affidavit that his interest will thereby be materially prejudiced.'

**1853-4.**—No. 36. On practice, where slaves are witnesses. No. 52. On appointment and duties of guardians of free negroes.

**1856.**—An act requiring the residence of owner or overseer on plantation of more than six hands.

**1858.**—Laws on trafficking and gaming with slaves. An. L. pp. 35, 285, 291.'

<sup>1</sup> *Barlow v. Lambert*, 28 Ala. R. N. S. 704; S. C. 5 Am. Law Reg.:—on hiring of slaves, and what is loss of slave's time if he dies, is of interest in view of the question—whether slavery rests on custom or legislation.

<sup>2</sup> A provision in this Code, §§ 3824-3837, directs the governor to surrender fugitives from justice on demand from other States. Toulmin's Dig. p. 226, gives a territorial law of 1814, giving similar power.

<sup>3</sup> Jan. 11, 1861. A State Convention passes an Ordinance to dissolve the Union between the State of Alabama and other States united under the compact and style of the United States of America.

## CHAPTER XIX.

THE LOCAL MUNICIPAL LAWS OF THE UNITED STATES AFFECTING CONDITIONS OF FREEDOM AND ITS CONTRARIES. THE SUBJECT CONTINUED. LEGISLATION IN THE STATES AND TERRITORIES FORMED IN LANDS ACQUIRED BY TREATY OR CONQUEST; THE STATES LOUISIANA, MISSOURI, ARKANSAS, IOWA AND MINNESOTA; THE TERRITORIES NEBRASKA AND KANSAS, AND THE INDIAN TERRITORY; THE STATES FLORIDA, TEXAS, CALIFORNIA AND OREGON; AND THE TERRITORIES WASHINGTON, UTAH AND NEW MEXICO.

### § 566. LEGISLATION OF THE STATE OF LOUISIANA.

The territory on either side of the Mississippi River between the lands claimed by Spain and Great Britain on the east and by Spain on the west, to which the name Louisiana was given, in 1682, by La Salle, was held by France until 1762, when it was ceded to Spain. Possession under the treaty was not taken until 1769. The private law continued to be for the greater part such as had been established by the French.<sup>1</sup> The

<sup>1</sup> See McLean, J., in *Parsons v. Bedford*, 3 Peters, 450. Crozat's charter, Sep. 14, 1712, provided, "Our edicts, ordinances and customs, and the usages and customs of the mayoralty and shrievalty of Paris shall be observed for laws and customs in the said country of Louisiana." 1 B. & D. 440. In 1769, 1770, by proclamation of O'Reilly, the Spanish governor, the law of public administration, including courts of civil and criminal jurisdiction, was exchanged for a system conformed to that of other Spanish dependencies. The law of crimes and punishments and of testaments was likewise changed at this time. See Proclamations in 1 Am. State Papers Misc. 362.

same territory was retroceded to France, Oct. 1st, 1800, by the secret treaty of St. Ildefonso, and on the 30th April, 1803, ceded by France to the United States.<sup>1</sup>

In the colonial dependencies of both France and Spain the slavery of Indians<sup>2</sup> and negroes had been legalized by the same principles of jurisprudence which had introduced it into the English colonies.<sup>3</sup>

The third article of this treaty provided that "the inhabitants of the ceded territory shall be incorporated into the Union of the United States and admitted as soon as possible, according to the principles of the federal Constitution, to the enjoyment of all the rights, advantages and immunities of citizens of the United States, and in the meantime they shall be maintained and protected in the free enjoyment of their liberty, property,<sup>4</sup> and the religion which they profess." VIII. U. S. St. 200; 1 B. & D. 435.<sup>5</sup>

1804, Mar. 26. The act of Congress,—*An act erecting Louisiana into two Territories and providing for the temporary government thereof.* II. U. S. Stat. 283. Sec. 3. Secures

<sup>1</sup> Under this cession the United States claimed all south of the 31st deg. of N. Lat. and east of the Mississippi to the boundary of Spanish Florida. The western boundary of Louisiana was never settled in any of the treaties, there being nothing to determine it except the grant to Crozat of "all the country drained by the waters emptying directly or indirectly into the Mississippi." See the extracts given in 1 B. & D. pp. 435, 437. In the treaty of 1819, by which Florida was ceded, the boundary between Spanish Mexico and the United States was determined to be—The Sabine to 32° N. L.; thence northerly on a meridian to the Red River, and along the course of that river to 100° E. Long, from Greenwich; thence north on that meridian to the Arkansas, then following that river to its head and 42° N. L., and along that line to the Pacific.

<sup>2</sup> *Marguerite v. Chouteau*, 2 Missouri, 70:—Indians taken in war, before O'Reilly's proclamation, in 1769, and the descendants of such Indian women, could be held as slaves.

<sup>3</sup> *Ante*, vol. I. p. 212, *Chouteau v. Pierre*, 9 Missouri, 1:—His charter allowed Crozat "the faculty to send annually a vessel to Guinea for negroes whom he may sell in Louisiana, to the exclusion of all others." 1 Martin's Louisiana, 180. A like monopoly was given to Law's Mississippi Company. The edict or Code Noir of Louis XIV. recognized but did not first legalize slavery; as is sometimes said, as in 2 Gilman, 1. This Code dated from 1724. It is remarkable for recognizing the marriage state among slaves. Art. 6-10. See 1 Gayarré Hist. of La., 362, and App. Also in 2 ib. App. The governor's police regulations which are severe beyond the Code. Carondelet, Spanish governor in 1792, 1795, issued some new regulations, 3 Gay. 313; 1 Am. State Papers Misc. 380. A Royal Order, in 1793, specially sanctioned importation. Ib. 390.

<sup>4</sup> This would have been the effect of international jurisprudence without this provision. *Delassus v. the United States*, 9 Peters, 133; *Strother v. Lucas*, 12 ib. 436.

<sup>5</sup> 1803, Oct. 31. An act enabling the President to take possession and for the



trial by jury in criminal cases, and in civil when either party desires, and the writ of habeas corpus to the inhabitants. 7. Declares that certain enumerated acts of Congress shall have effect in the above-mentioned Territories, among which are the act of Feb. 12, 1793, c. 7, respecting fugitives; that of March 22, 1794, c. 11, *to prohibit the carrying on of the slave trade from the United States to any foreign place or country*; and the act Feb. 28, 1803, c. 10, *to prevent the importation of certain persons into certain States where, by the laws thereof, their admission is prohibited*. 10. Forbids under a penalty the importation of slaves from any place without the limits of the United States; and the importation of slaves brought into the United States since May 1, 1798,<sup>1</sup> and that no slaves shall be introduced except by a citizen of the United States removing into said Territory for actual settlement, and being the bona fide owner; and slaves imported contrary to this law shall receive their freedom. 11. Continues the laws then in force.

By this act the portion of the Territory south of the 33d parallel is organized as *the Territory of Orleans*,<sup>2</sup> all of which is included in the present State of Louisiana.

**1805**, March 2. Another act authorizing the President to establish a government within the Territory of Orleans.<sup>3</sup> II. U. S. Stat. 322, 3 B. & D. 648, provides that the inhabitants "shall be entitled to and enjoy all the rights, privileges, and advantages secured by the Ordinance of 1787, and now enjoyed by the people of the Mississippi Territory."

**1806**, c. 11, of the territorial legislation, *For the regular temporary government*. Sec. 2. That the "military, civil and judicial powers" of the existing government be exercised under the President's direction "for maintaining and protecting the inhabitants in the free enjoyment of their liberty, property, and religion." II. U. S. St. 245; 3 B. & D. 562. The President's proclamation of Oct. 27, 1810, on taking possession, among reasons for the act mentions facilities given to violations of the laws prohibiting the introduction of slaves. XI. U. S. Stat. App. 761.

<sup>1</sup> The reason of this in 2 Hildr. 2d Ser. 499.

<sup>2</sup> By section 4, the executive and legislative power is vested in the governor and council; the laws, "if disapproved by Congress, shall thenceforth have no force."

<sup>3</sup> Sec. 7. Provides for the admission of the Territory as a State, when the "free inhabitants" shall be sixty thousand in number. Provision is made for elections; but neither in this act, nor in that of 1804, is the possession of the franchise settled.

*tion of the rights and duties of apprentices and indented servants. —. An act to prevent the introduction of free people of color from Hispaniola and other French islands into the Territory of Orleans. —, c. 33. An act prescribing the rules and conduct to be observed with respect to negroes and other slaves of this Territory.* Sec. 1. Slaves to have the enjoyment of Sundays, and be paid when they work on that day; but not extending to slaves in specified domestic employments. 2–6. Regulating food, clothing, care of sick, &c. 7. Hours of rest and labor, following “the old usages of the Territory.” (No similar provisions appear in the R. S.) 8. Disabled slaves sold at auction not to be separated from some of their children. (R. S. § 67.) 9. Children under ten years not to be sold separately from their mothers. (R. S. § 75.) 10. Slaves real estate. 11–14. Certain police regulations. 15. “As the person of a slave belongs to his master, no slave can possess anything in his own right or dispose in any way of the produce of his industry without the consent of his master.” 16. Slaves shall not be parties in civil suits, nor witnesses against whites. 17. May be prosecuted criminally. 18. “The condition of a slave being merely a passive one, his subordination to his master and to all who represent him is not susceptible of modification or restriction (except in what can incite the said slave to the commission of crimes) in such manner that he owes to his master, and to all his family, a respect without bounds, and an absolute obedience, and he is consequently to execute all the orders which he receives from him, his said master, or from them.” 19, 20, 21. On the use of fire-arms by slaves and free colored persons. (R. S. § 63.) 22. Compensation for their robberies. 23–37. Respecting runaways; how pursued; if they will not surrender may be fired upon.” (R. S. § 61.) 38. Slaves prohibited trading or holding property. 39. Penalty for not providing for slaves. 40. “Free people of color ought never to insult or strike white people, nor presume to conceive themselves equal to the white; but

<sup>1</sup> This is popularly, and in some of the digests, called the Black Code—*Code Noir*.

<sup>2</sup> *Laperouse v. Rice*, 18 La. 567.

on the contrary they ought to yield to them on every occasion, and never speak or answer them but with respect, under the penalty of imprisonment according to the nature of the offence." An act on crimes and offences is part of the same Code. 41. Directs the trial of slaves for capital offences by a county judge, or two justices, and from three to five freeholders. 42. Other offences, by a justice and freeholders. 43, 44. Regulations of trial. 45. Evidence of free Indians and slaves under oath in trials of slaves, and by sec. 46, likewise in all causes against free negroes, &c., where they have a jury trial. 47. Capital crimes declared. 48. Whites concealing goods stolen by slaves. 49. "Any slave who shall willfully strike his master, mistress, or his or her child or children, (or overseer, by a law of 1814,) so as to cause a contusion, or effusion or shedding of blood, shall be punished with death." (R. S. § 3.) 50. Rebelling against overseers, how punished. (R. S. § 14.) 51. Slave, for any killing, or for causing insurrections, to suffer death. 52. Payment for those executed. (Suppl. laws, 1818, 1830.) 53. Procuring witnesses against slaves. 54. Penalty for concealing from justice. 55. Penalty for striking a white person. (R. S. § 9.) 56. Person willfully killing a slave to be tried and condemned agreeably to the laws of the Territory. For cruel punishments a fine between two and three hundred dollars. 57. Determining responsibility when such act is not witnessed. 58. Penalty for not keeping an overseer. (R. S. § 73.) 59. Slave disclosing plots, &c., to be rewarded with freedom and a sum of money. 60-62. On legal proceedings. Supplementary on minor points are acts of 1807, c. 30, about overseers, 1809, c. 24. 1811, c. 14. Slaves may sell goods from baskets only. 1814, c. 8, sec. 1, restricts compensation for death of slave. 2. Includes white overseers in the intent of sec. 49 of the above Code. Of the same year, c. 12, for maintaining permanently on each plantation one white person for every thirty slaves.

1807, c. 10. Imposes conditions on emancipation. —, c. 28, is entitled to *prevent the immigration of free negroes and mulattoes into, &c.* —. An act directing proceedings for freedom by persons held in slavery. Steele & McCampbell, Ark. Dig. 1835, p. 268.



**1808**, c. 31. Prescribing the formal designation of free colored people in public or notarial acts.

**1809**, c. 2. *An act to provide for the delivery of fugitive slaves to their owners, inhabitants of the Spanish provinces adjacent to the Territory of Orleans.* Judges and justices authorized to hear the complaint, &c.

**1810**, c. 20. Concerning importation of slaves who had committed crimes in the States. Acts of 1817, 1818, contain additional penalties, and prohibit the introduction of free blacks who may have committed crimes. —, c. 28. An act respecting slaves imported into this Territory in violation of the Act of Congress, of March 2, 1807, provides that slaves unlawfully imported shall be seized and sold for the benefit of the State.

**1812**,<sup>1</sup> Jan. 22. Constitution of the State adopted by a convention of representatives. Preamble recites the act of Congress of 1811, and declares its object "in order to secure to all the citizens thereof the right of life, liberty, and property (afin d'assurer à tous les citoyens qui habitent ce territoire la jouissance des droits attachés à l'existence, à la liberté, et aux propriétés). Art. II. sec. 8. Suffrage limited to whites. —, c. 12. Authorizing a militia corps of free men of color, commanded by a white. 1815, c. 24, allows a police corps of free blacks in Natchitoches.

**1816**, c. 4. Punishment of masters of vessels attempting to carry off slaves, or allowing them to conceal themselves. (See 1805, on crimes and misdemeanors, amended 1806.) Additional securities in act of 1835, An. L. p. 152, R. S. §§ 32–37. —, c. 43, sec. 1. No slave to be admitted as witness in matters civil or criminal against a white. 2. Or against a free person of color, unless charged with raising insurrection, &c. 5. A free person of color assaulting or insulting a white to be punished by imprisonment or fine. Other sections of penal

<sup>1</sup> Feb. 20, 1811. An act enabling the people of the Territory "to form a Constitution and State government, and for the admission of such State, &c. II. Stat. U. S. 641, 4 B. & D. 328. Sec. 2 designates the persons who shall vote. April 8, 1812. *An act for the admission of the State of Louisiana into the Union, and to extend the laws of the United States to the said State.* II. Stat. U. S. 701. 4 B. & D. 402. April 14. An act to enlarge the limits of the State of Louisiana, II. U. S. Stat. 708, makes the Pearl River the eastern boundary.

law. An act of 1825 provides for the trial of slaves accused of any crime by the parish judge and six freeholders. The above laws are in Martin's Digest, of 1816, and in Lislet's Digests. Supplementary are acts of 1826, 1827, establishing depots for the detention and sale of runaway slaves. 2 Lislet's D: 339.

**1825.**—*The Civil Code.* Book I. *Of Persons.* Title I. *Of the distinction of persons.* Art. 35. "A slave is one who is in the power of a master to whom he belongs. The master may sell him, dispose of his person, his industry, and his labor: he can do nothing, possess nothing, nor acquire anything but what must belong to his master." 36. "Manumitted persons are those who, having been once slaves, are legally made free." 37. "Slaves for a time, or *statu liberi*, are those who have acquired the right of being free at a time to come, or on a condition which is not fulfilled, or in a certain event which has not happened, but who, in the meantime, remain in a state of slavery." 38. "Freemen are those who have preserved their natural liberty; that is to say, who have the right of doing whatever is not forbidden by law." Title VI.—*Of master and servant.* Ch. 1. *Of the several sorts of servants.* Art. 155. "There are in this State two classes of servants, to wit: the free servants and the slaves." Ch. 2. *Of free servants.* Art. 156–171. Ch. 3. *Of slaves.* Art. 172–196. Art. 172. Police and criminal law to be specially fixed by the legislature. 173. "The slave is entirely subject to the will of his master, who may correct and chastise him, though not with unusual rigor, nor so as to maim or mutilate him, or to expose him to the danger of loss of life, or to cause his death." 174–177. Enumerating the various disabilities of slaves, among which, that he can not contract "except as to his own emancipation." 178–181. As to the responsibility of masters in respect to the actions of slaves. 182. "Slaves cannot marry without the consent of their masters, and their marriages do not produce any of the civil effects which result from such contract." 183. "Children born of a mother then

<sup>1</sup> See in 6 Monthly Law Rep. p. 290 (1853), charge to grand jury by Judge Perkins, on treatment of slaves.

<sup>2</sup> *Girod v. Lewis* (1819), 6 Martin, 559;—the marriage of a slave has its civil effects upon his emancipation.

in a state of slavery, whether married or not, follow the condition of their mother." 184-192. On the conditions on which manumission may take place. 193. "The slave who has acquired the right to be free at a future time, may receive property by gift." 194. Such cannot be taken out of the State, and may appear in court to claim protection. 196. The child of a *statu libera* becomes free at the time fixed for the mother's freedom, even if the mother dies before that time.<sup>1</sup>

**1828**, c. 11.—*An act to repeal the act to prohibit the introduction of slaves for sale into this State.* No particular statute is designated. The only acts of this description then existing seem to have been those prohibiting the introduction of slaves who had committed crimes. See law of 1810. That such are referred to, appears from the act of 1829, c. 24,—*An act relative to the introduction of slaves and for other purposes*, containing various precautions in reference to the introduction of such slaves. Sec. 15, 16, forbid the introduction of children, under ten years, without their mothers. Repealed by act of 1831, c. 30.

**1830**.—*An act to prevent free persons of color from entering into this State, and for other purposes.* Laws, p. 90, sec. 1. Free negroes and mulattoes arrived since Jan., 1825, to depart within sixty days. 2. One year's imprisonment for non-compliance, and for life at hard labor for the second offence. 5. Negro and mulatto seamen remaining longer than thirty days subjected to like penalty. — *An act to punish, &c.* "That whosoever shall write, print, publish, or distribute anything having a tendency to produce discontent among the free colored population of the State or insubordination among the slaves therein," shall be punished by imprisonment at hard labor for

<sup>1</sup> It had been so held in *Catin v. D'Orgenoy* (1820), 8 Martin, 218. But, since 1857, it seems even the children of those who, before the act of that year forbidding emancipation, were *statu libera*, are slaves for life. *Pauline v. Hubert*, 14 La. An. 161. "The child of a *statu libera*, who, by Art. 196 of the code, is to become free at the time fixed for the enfranchisement of the mother, requires the consent of the public authorities to her emancipation, and since the act of 1857 the emancipation cannot be effected." See, also, *Marshall v. Watrigant*, 13 La. An. 619, where the question arose of the effect of the law of another State from which the *statu libera* had been removed. The court was not unanimous in either of these two cases.



life, or suffer death. 2. "Whosoever shall make use of language in any public discourse, from the bar, the bench, the stage, the pulpit, or in any place whatsoever; or whosoever shall make use of language in private discourses or conversations, or shall make use of signs or actions" tending, &c., as above, shall be punished in like manner (R. S., §§ 27-30). 3. "That all persons who shall teach, or permit or cause to be taught, any slave in this State to read or write," shall be imprisoned not less than one nor more than twelve months. 6, 7. For compelling free colored persons to leave the State (act of 1831, c. 46, excepts those of orderly lives who have not entered the State in violation of law). 8. Penalty for introducing free person as a slave. 9. Punishment of any white person who shall publish or use language "with the intent to disturb the peace or security of the same, in relation to the slaves of the people of this State, or diminish that respect which is commanded to free people of color by, &c., or destroy that line of distinction which the law has established between the several classes of this community." 10. Owners emancipating slaves must give security for their leaving the State. (An exception by act of 1831, c. 46, sec. 2, when the emancipation is for "long, faithful, or important services," "with consent of the police jury of the parish.")

**1831-2**, c. 1.—*An act relative to the introduction of slaves*, amended by an act of the same session, and one in 1833, containing numerous minor provisions and exceptions connected with the leading purpose that slaves shall not be introduced except by persons immigrating to reside, and citizens who may become owners, "provided that the slaves were not purchased in the States of Mississippi or Alabama, or in the Territory of Arkansas, or in Florida," provide for the enfranchisement of slaves introduced contrary to this, but to be sent out of the State. These acts repealed by act of 1834, Jan. 2, Annual Laws, p. 6.

**1839**, c. 45.—*An act to prevent the carrying away of slaves, and for other purposes*. Requires a bond of persons engaged in the business of shipping seamen, for the value of slaves who may be unlawfully shipped. (Amending is, an act

of 1843, c. 58.) 4. The owner and the master, as well as the vessel, made "liable to the owner of any slave so taken out of the State, for the value of the slave."

**1840, c. 80.**—*An act to amend the several acts passed for the purpose of preventing slaves from being transported or conducted out of the State against the will of their owners.* 1. Declares the presumption of law against the master, of intention to transport, if the slaves are found on board. 2, 4. Imposes a fine, besides liability for value, on the owners and masters. 3. Gives the slave-owner "a tacit privilege on the ship."

**1841-2, c. 123.**—*An act more effectually to prevent free persons of color from entering this State, and for other purposes.* Sec. 1. Forbids free negroes, &c., coming on board any vessel either as passengers or as employees. If such come they are to be imprisoned until the ship leaves—the ship paying expenses. 2. Security is to be given by the master; otherwise, the owners made liable to penalty of 1,000 dollars. 3. If not carried away by the vessel, they are to be transported from the State by the sheriff. 4. Penalty by imprisonment for returning. 5. Duty of harbor-masters, &c. 6. Penalty for introducing such persons, by fine; and imprisonment for the second offence. 7. Penalty for harboring such persons (R. S., §§ 99-103). 8. This is not to prevent free persons of color, natives of the State, or resident since 1825, from leaving or returning, "provided they shall not have established their domicile in a free State of the Union" (R. S., § 98). 9. No inhabitant shall carry his slave into a State or country where slavery is not tolerated. 10. "That nothing herein contained shall be so construed as to deprive an inhabitant of this State of his right of property in a slave who, contrary to the consent and will of his master, shall have gone out of the limits of the State into any State or Territory of the Union, or in any foreign country where slavery does not exist; and that said owner, in case he shall recover the possession of his slave, shall be entitled to his full property, and that said slave shall never be admitted to claim his freedom as resulting from the fact of his having set his foot upon the soil of any State, Territory, or foreign country where slavery is not acknowledged, all laws to



the contrary notwithstanding; and that the owner of any such slave shall be subject to none of the penalties or dispositions contemplated in this act," &c. (R. S., § 81.) 11. Masters of vessels arriving must report to the mayor the free negroes on board. 12, 13. Make it unlawful "to bring into this State any slave entitled to freedom at a future period, or a *statu liber*," or to purchase such. 14. All "*statu liberi*," when they become free, shall be transported. (R. S., §§ 95, 96.)

1843, c. 73, amending, permits free blacks, who have resided since 1838, to remain, on giving evidence of good character, with bonds to obey the laws, and being registered.<sup>1</sup>

1846, c. 137.—*Relative to trial of slaves*. Amend. by 1847, c. 260. Establishing tribunals composed of two justices and ten slave-owners for the trial of slaves accused of capital crimes, and the proceedings.

1846, c. 189.—*An act to protect the rights of slaveholders in the State of Louisiana*, "enacts that from the passage of this act no slave shall be entitled to his or her freedom under the pretence that he or she has been, with or without the consent of his or her owner, in a country where slavery does not exist,"<sup>2</sup> or in any of the States where slavery is prohibited." (R. S., § 81.)

1848, c. 287, and extra Ses., c. 95.—Amending police regulations also of 1852, c. 27, against gambling with slaves, and c. 326, on trading with slaves.

<sup>1</sup> The State v. Levy (1850), 5 La. Ann. 64:—"That free negroes are under no incompetency as witnesses. *Per curiam*:—"Our legislation and jurisprudence upon this subject differ materially from those of the slave States generally, in which the rule contended for prevails. This difference of public policy has no doubt risen from the different condition of that class of persons in this State. At the date of our earliest legislation as a Territory, as well as at the present day, free persons of color constituted a numerous class. In some districts they are respectable from their intelligence, industry, and habits of good order. Many of them are enlightened by education, and the instances are by no means rare in which they are large property-holders. So far from being in that degraded state which renders them unworthy of belief, they are such persons as courts and juries would not hesitate to believe under oath. Moreover, this numerous class is entitled to the protection of our laws; but that protection would in many instances be illusory, and the gravest offences against their persons and property might be committed with impunity, by white persons, if the rule of exclusion contended for were recognized," &c.

<sup>2</sup> In *Liza v. Puissant* (1852), 7 La. Ann. 80, the same is maintained, as a doctrine of international private law, in cases where there was no intention of the owner to acquire a domicile. The earlier cases are there referred to as leaving the question subject to a doubt which was removed by the statute.



**1852**, c. 315.—*Concerning the emancipation of slaves in this State.* Permits emancipation only on condition that they be sent out of the United States.

**1854**, c. 215.—A new act for compensation in certain cases for slaves sentenced to death or imprisonment.

**1855**, c. 308.—*An act relative to slaves and free colored persons*,<sup>1</sup> contains one hundred sections, digested from the existing statutes, repeals all conflicting laws "and all laws on the same subject matter, except what is contained in the civil code or code of practice. Sec. 29. On using language calculated to produce discontent and insubordination, includes the offence of "being knowingly instrumental in bringing into this State any paper, pamphlet or book having such tendency."

**1856**.—In the Revised Statutes,<sup>2</sup> under the title *Black Code*, the law is given under the heads: Crimes and offences committed by slaves and free colored persons; §§ 1–17. Offences against slaves, Indians, and free persons of color; §§ 18–38. Trial, punishment, and compensating for slaves executed; §§ 39–60. Trial of slaves accused of capital crimes in New Orleans; §§ 61–66. Rights, duties, &c., of owners of slaves; §§ 67–76. Emancipation of slaves; §§ 77–81. Runaway slaves; §§ 82–93. Free persons of color and statu liberi; §§ 94–105. These provisions, in their phraseology and general scope, appear to resemble the newer codes of the other slaveholding States. Whether the existing law of that State, in respect to slaves, is materially different from the earlier law, it would, however, be difficult to say.

**1857**, c. 69. Declares that thereafter no slave shall be

<sup>1</sup> *Landry v. Klopman*, 13 La. Ann., 845, where a runaway slave from Louisiana had been arrested in Mississippi, and there sold after advertisement, according to the laws of that State, held that the title was divested thereby, and that such legislation of the State of Mississippi was not in conflict with any right of the Louisiana owner, under the Constitution of the United States and law of Congress relating to fugitive slaves, being within the police power of the State. The court rely on Story's opinion in *Prigg's case*.

<sup>2</sup> In R. S., pp. 171, 172, are found the provision of the Constitution of the United States for the delivery of fugitives from justice on demand, with the act of Congress of 1793, and the Governor is authorized, at his discretion, to deliver up persons demanded.

emancipated in this State.<sup>1</sup> —, c. 181. A new act on runaway slaves. —, c. 187. A new act respecting buying from slaves. —, c. 232. A new act on crimes by slaves, and proceedings in trials for such.

**1859**, c. 275.—*An act to permit free persons of African descent to select their masters and become slaves for life.* Petition to be made to the district court, which shall decree, on being satisfied of the absence of fraud or collusion, and of the character of the master. Children under ten years, of mothers thus enslaved, become slaves.<sup>2</sup>

#### § 567. LEGISLATION OF THE STATE OF MISSOURI.

The portion of the Louisiana purchase not included in the Territory of Orleans by the act of Congress of March 26, 1804,<sup>3</sup> was, by sections 12, 13, of the same act, designated the District of Louisiana, and placed under the executive and legislative power of the governor and judges of the Indiana Territory; it being provided that the laws then in force in the District should continue "until altered, modified, or repealed" by said governor and judges, whose legislation was to be sent to the President for the sanction of Congress.

**1804**, Oct. 1. A law of the District of Louisiana of this date is the leading act on the subject of slavery in the Territories and States formed within that District; it contains the police regulations at that time common in the southern States, against wandering without papers, using arms, meetings, &c., defines conspiracy, &c. One section provides that "if any negro or other slave shall prepare, exhibit, or administer any medicine whatsoever, it shall be felony, unless it shall appear to

<sup>1</sup> *Marshall v. Watrigan*, 13 La. Ann. 619. Since this act, the right of a statu libera to freedom cannot be recognized. See the present policy of the State declared, and this statute maintained, in *Deshotels v. Soileau*, 14 La. Ann. R. 745. *Pauline v. Hubert*, ib. 161. *Price v. Ray*, ib. 697. In *Jamison v. Bridge*, ib. 31:—"As emancipation is now prohibited, plaintiff cannot prosecute this suit for his freedom." *Brown v. Raby*, ib. 41, *cap.* 2—"A slave claiming to be a statu liber, whose master is a resident of another State, cannot have her rights judicially investigated in this State. She should resort to the courts of the State in which her master is domiciliated. Under our present law no slave can be emancipated, and a slave's right to freedom cannot be established here according to the laws of another State."

<sup>2</sup> A convention, in the name of the State of Louisiana, declared, Jan. 26, 1860, an *Ordinance of Secession* similar to those shortly before passed by conventions in other southern States.

<sup>3</sup> *Ante*, p. 155.

have been without ill intent nor attended by bad consequences." Not to apply to slaves acting under order. Fines are imposed on masters of vessels carrying away slaves. A section declares "all negroes and mulatto slaves in all courts of judicature within this District shall be held, taken, and adjudged to be personal estate." Another permits emancipation by will or other writing. Other provisions relate to runaways and emancipated slaves. See Steele and McCampbell's Digest of 1835, p. 520, citing from L. L. T. The same digest gives, of the same date, an act providing punishment by whipping, "of a negro or mulatto, bond or free, who shall at any time lift his hand in opposition to any person not being a negro or mulatto." See also p. 27 of Vol. I. Laws of the District and Territory of Louisiana, and the Territory and State of Missouri up to 1824, in two volumes, ed. 1842. Ch. 3—By the governor and judges of Indiana Territory.

The District was constituted the Territory of Louisiana under a separate government by an act of Congress of 1805.<sup>1</sup>

**1812**, June 4. The Territory of Louisiana was constituted the Territory of Missouri by act of Congress of this date.<sup>2</sup> Sec. 14. Contains provisions in the nature of a bill of Rights. 15. Enumerated limitations on the local legislature. 16. Continues the former laws of the Territory.

Missouri laws supplementary to the act of 1804 are—of 1817, Jan. 22; see Vol. I. Laws, &c. (above cited), p. 499, c. 187; of 1822, Dec. 9, *ib.* p. 957, c. 399, substituting a fine as penalty instead of whipping for dealing with slaves.

**1816**, Jan. 19. An act adopting the common law of England and English statutes prior to 4th of Jas. I., so far as not contrary to the law and Constitution of the United States and the laws of this Territory. (Re-enacted Feb. 12, 1825.)  
— An act on crimes, &c., makes whipping the only punish-

<sup>1</sup> II. St. U. S. 331; 3 B. & D. 658:—The legislative power is vested in the governor and three judges. Any law declared invalid which may be inconsistent with the Constitution and laws of the United States, and all such legislation to be subject to the approval of Congress.

<sup>2</sup> II. St. U. S. 743; 4 B. & D. 438:—By sec. 6 a legislative assembly is provided for; the electors to be "free white citizens of the United States." Modifying is act of 1816, Ap. 29. III. St. U. S. 328; 6 B. & D. 135.



ment of slaves for offences not capitally punishable. (Vol. I. Laws, above cited, p. 478, c. 1685, 16.)

1820,<sup>1</sup> June 12. Constitution of the State of Missouri adopted by the inhabitants of the Territory within the limits of the present State.<sup>2</sup> Art. 1, sec. 10, limits the elective franchise to white male citizens of the United States. 27. "In prosecutions for crimes, slaves shall not be deprived of an impartial trial by jury, and a slave convicted of a capital offence shall suffer the same degree of punishment, and no other, that would be inflicted on a free white person for a like offence; and courts of justice before whom slaves shall be tried shall assign them counsel for their defence." 28. "Any person who shall maliciously deprive of life or dismember a slave, shall suffer such punishment as would be inflicted for the like offence if it were committed on a free white person." Art. XIII. is a Bill of Rights attributing rights to "the people," others to "every person." The words, all freemen, are not employed, but life, liberty, &c., are not attributed to all as natural, &c.

<sup>1</sup> The limits of the proposed State and the representation of the inhabitants in their constituent assembly or convention were fixed by the act of Congress of March 6, 1820. *An act to authorize the people of Missouri Territory to form a Constitution and State government, and for the admission of such State into the Union on an equal footing with the original States, and to prohibit slavery in certain Territories.* III. Stat. U. S. 545; 6 B. & D. 455.

<sup>2</sup> In Art. III. sec. 26, it is declared:—"The general assembly shall have no power to pass laws: 1. For the emancipation of slaves without the consent of their owners or without compensating them. 2. To prevent bona fide emigrants bringing from the other States," &c., "such persons as may there be deemed to be slaves so long as any persons of the same description are allowed to be held as slaves by the laws of this State." They shall have power: 1. To prohibit the introduction of slaves who have committed crimes in other States, &c. 2. To prohibit the introduction of slaves for speculation or as "an article of trade or merchandise." 3. To prevent the introduction of slaves imported into the United States contrary to law. 4. To permit emancipation on giving security, &c. It shall be their duty to pass laws: 1. "To prevent free negroes and mulattoes from coming to and settling in this State under any pretext whatsoever." 2. "To oblige the owners of slaves to treat them with humanity and to abstain from all injuries to them extending to life or limb."

Resolution, March 2, 1821, "providing for the admission of the State of Missouri into the Union on a certain condition." III. Stat. U. S. 645; 6 B. & D. 590. "Resolved, &c., That Missouri shall be admitted into this Union on an equal footing with the original States, in all respects whatever, upon the fundamental condition that the fourth clause of the twenty-sixth section of the third Article of the Constitution submitted on the part of said State to Congress shall never be construed to authorize the passage of any law, and that no law shall be passed in conformity thereto by which any citizen of either of the States in this Union shall be excluded from the enjoyment of any of the privileges and immunities to which

**1823.**—An act supplementary to the territorial law of 1804, prohibits dealing with slaves. R. L. of 1825, p. 746; and an act respecting patrols, &c. Sec. 2 declares penalty on ferrymen carrying slaves without pass. Ib. 747.

**1824,** Dec. 30. An act to enable persons held in slavery to sue for their freedom. Rev. L. of 1825, p. 404. •Recognizances required of the defendant, but not of the petitioner. Another act with the same title in 1835, amended by laws of 1841, p. 146, law of 1855. R. S. 809.<sup>1</sup>

**1825.**—An act to provide for apprehending and securing runaway slaves. R. L. of 1825, p. 747.

**1831.**—An act to change the manner of trying slaves. —. An act to prevent persons having a limited title in slaves from carrying them out of the State. Sess. L. p. 95.

**1835.**—*An act concerning slaves*, seems intended as the leading act: amended by Laws of 1841, pp. 146, 147. A revision of this year includes the ordinary titles. Under the title *Fugitives from justice*,<sup>2</sup> sec. 19–30, is a law for the delivery of fugitives from labor on claim, similar in all provisions to the law of Arkansas, of 1838. (See *post*, p. 172.) The same law is re-enacted in the Rev. of 1845, p. 537, and R. S. of 1855, p. 813. Sec. 28 declares that no person shall take or remove any such fugitive from this State, or do any act towards such removal, unless authorized so to do, pursuant to the provisions

such citizen is entitled under the Constitution of the United States: *Provided*, that the legislature of the said State by a solemn public act shall declare the assent of the said State to the said fundamental condition and shall," &c. From the debates in Congress, it appears that the provision intended under the designation—the 4th clause of the 26th Section of the 3d Article of the State Constitution—is the first clause of the third subdivision of that Article, making it the duty of the legislature to pass laws against the immigration of free blacks.

The assent of the State was given in *A Solemn Public Act declaring, &c.*, June 26, 1821, reciting a virtual assent to the condition proposing to become one of the United States, and that this assent could in no wise affect the powers of the State under the Constitution of the United States. See the introductions in editions of Missouri laws.

By act of March 16, 1822, the Laws of the United States are extended to the State of Missouri. III. Stat. U. S. 653.

<sup>1</sup> The plaintiff, if successful, is not entitled to damages. *Tramell v. Adam*, 2 Missouri R. 155. *Gordon v. Duncan*, 3 Ib. 385.

<sup>2</sup> Empowering the governor to surrender on demand. An act of 1824, Dec. 18, had authorized the executive to deliver up fugitives from justice when demanded conformably to the act of Congress. The same in 1 Rev. L. of 1825, p. 406.

of this act. 29. Every person violating this section shall forfeit and pay five hundred dollars to the aggrieved party.

**1837.**—*An act to prohibit the publication, circulation, and promulgation of the abolition doctrines.* An. Laws, p. 3, in one section: providing punishment by fine and imprisonment.

**1843.**—*An act to prevent free persons of color from entering the State, &c.,* Ann. L. pp. 66, 68. Provides for their being carried out, and punishes their return by imprisonment; prohibits bringing slaves entitled to freedom at a future time, with exception as to natives of the State, "provided they have not established their domicile in some free State of this Union;" requires resident negroes to procure a license to remain. —. An act to prohibit sale of poisons to slaves and minors. Ib. 102. —. An act respecting runaway slaves, and punishment for enticing away slaves from their owners. Ib. 133.

**1845.**—A revision containing the usual titles, amended by act of 1847. An. L. p. 104, requires resident free negroes to procure licenses to remain.<sup>1</sup>

**1847.**—*An act respecting slaves, free negroes, and mulattoes.* An. L. p. 103. Sec. 1. "No person shall keep or teach any school for the instruction of negroes or mulattoes in reading or writing in this State." 2. Forbids religious meetings of negroes, &c., unless some justice, constable, &c., be present "to prevent all seditious speeches and disorderly conduct of every kind." 3. Such schools and meetings declared unlawful assemblages. 4. Prohibits absolutely the migration into the State of any free black. 5, 6. Declares the penalties.

**1855.**—Revised Statutes. The earlier laws appear, in the titles *Slaves, Negroes, and Mulattoes*, to have undergone no alteration. See the Compiler's notes, pp. 1093, 1471.

**1856-7.**<sup>2</sup>—An act declaring free negroes, excepting hands

<sup>1</sup> In the case of Hatfield, a free man of color, who had resided six years in St. Louis, having been born in Pennsylvania of free parents, committed for costs, it was urged that the State had no power to require of any citizen of Pennsylvania to obtain a license before he could become a resident of Missouri. The 2d sec. of the 4th art. of Constitution of the United States was relied on; also the resolution of Congress declaring the fundamental condition for the admission of Missouri. Judge Krum discharged the negro. 3 West. L. Journ. (July, 1846), 477.

<sup>2</sup> An act providing for the enslavement of free negroes in certain cases being submitted from the assembly to Governor Stewart, was returned by him, March 16,



on steamboats, punishable by fine and imprisonment for going to any free State or Territory and returning to Missouri. Ann. L. p. 82.

§ 568. LEGISLATION OF THE STATE OF ARKANSAS.

The Territory of Arkansas had been included in the Territory of Missouri before 1819.<sup>1</sup>

1819, Aug. 3. The first act of the governor and judges declaring the general laws of Missouri Territory to be in force. Laws of Ark. T. by Steele and McCampbell, ed. 1835, p. 70.

1825, Oct. 20. *An act supplementary to the several laws concerning slaves.* A short act providing for local patrols, and a tax on slaves for expenses. Act of 1827, Oct. 31, on the same subject. Ib.

1836.—Constitution of the State of Arkansas.\* Art. II. sec. 1. That all freemen, when they form a social compact, are equal, and have certain inherent rights, &c. 10. No freeman shall be imprisoned, &c. Art. II. 2. Restricts the suffrage to whites.<sup>2</sup>

1860, with objections: among which, that in providing for judgment against such negroes, &c., on a summary proceeding before a single judicial officer, the act was in violation of the constitutional guarantee of a trial by jury before deprivation of life, liberty, and property, in the State Constitution, Art. 13, sec. 8, 9. The governor cites case of Doran and Ryan, 1 Darne's Ky. R. 331, and 9 Darne's R. 447. He objected also to another feature of the bill "as anomalous and impracticable" in its character: which was, that it gave a right to the negroes, after becoming slaves, to sell their property before possessed and dispose of the proceeds.

<sup>1</sup> March 2, 1819. *An act establishing a separate territorial government in the southern part of the Territory of Missouri.* III. Stat. U. S. 493, 6 B. & D. 385. 1820, April 21. *An act relative to the Arkansas Territory,* III. Stat. U. S. 565, 6 B. & D. 485, provides that the act of June 4, 1812, modified by the act, April 29, 1816, shall be considered applicable to this Territory. *Ante*, p. 167.

<sup>2</sup> Act of Congress, June 15, 1836. *An act for the admission of the State of Arkansas into the Union, and to provide for the execution of the laws of the United States within the same, and for other purposes.* V. Stat. U. S. 50; 9 B. & D. 378. The question was agitated at this time whether an enabling act of Congress was necessary, or whether the people of the proposed State, in the first instance, might petition with the proffer of their Constitution. See the Attorney-General's instructions, under direction of President Jackson, Sept. 21, 1835, quoted in Report on Kansas, March 29, 1860, from Comm. of the Ho. of Rep. on Territories, Grow, Chairman. In the Preamble to their Constitution the people of Arkansas declare themselves as "having the right of admission into the Union as one of the United States of America, consistent with the federal Constitution, and by virtue of the treaty of cession by France," &c. See *ante*, Vol I. p. 412, note.

<sup>3</sup> It is provided, in Art. IV. sec. 23, that the General Assembly may prohibit the introduction of slaves who have committed high crimes. By sec. 25, they shall "have power to prohibit the introduction of any slave or slaves for the

**1838.**—Revised Statutes; which, under the appropriate heads, contain mostly re-enactments. In chap. 67, entitled *Fugitives from justice*, provision is also made, by sec. 15-22, for claims for fugitives from labor and service in other States. The claimant is authorized on affidavit to have warrant to arrest and bring before a judge of a court of record or a justice of the peace, who shall take proof on both sides and give a certificate to the claimant if satisfied of the claim. The claimant made liable to costs and damages to the party if he fails in proving his claim. Sec. 24. "No person shall take or remove any such fugitive from this State or do any act toward such removal unless authorized to do so pursuant to the provisions of this act. 25. Every person violating the provisions of the preceding section shall forfeit and pay for the use of the State any sum not less than one hundred dollars." (This law appears to have been copied from the law of Missouri of 1835, with the same title.) The same appears in English's Digest of 1848, c. 76, and in Digest of 1858, c. 77. Title, *Fugitives from Justice*.<sup>1</sup>

**1843, Jan. 20.** *An act to prohibit the emigration and settlement of free negroes or free persons of color into this State.*<sup>2</sup>

purpose of speculation, or as an article of trade or merchandise; to oblige the owner of any slave or slaves to treat them with humanity; and in the prosecution of slaves for crime they shall not be deprived of an impartial jury; and any slave who shall be convicted of a capital offence shall suffer the same degree of punishment as would be inflicted on a free white person, and no other; and courts of justice before whom slaves shall be tried shall assign them counsel for their defence." Art. VIII. sec. 1. "The General Assembly shall have no power to pass laws for the emancipation of slaves without the consent of the owners. They shall have no power to prevent emigrants to this from bringing with them such persons as are deemed slaves by the laws of any one of the United States. They shall have power to pass laws to permit owners of slaves to emancipate them, saving the right of creditors, and preventing them from becoming a public charge. They shall have power to prevent slaves from being brought to this State as merchandise, and also to oblige the owners of slaves to treat them with humanity.

<sup>1</sup> An act, authorizing the governor to surrender fugitives from justice, had been enacted in 1838. Ann. L. p. 133.

<sup>2</sup> *Pendleton v. the State* (1846), 6 Ark. (1 English), 509:—This act is not in conflict with the Constitution of the United States. Free persons of color are not citizens within the meaning of the 2d sec. of Art. 4. The court say, ib. 511:—"In recurring to the past history of the Constitution, and, prior to its formation, to that of the Confederation, it will be found that nothing beyond a kind of quasi-citizenship has ever been recognized in the case of colored persons. It is a principle settled in all the States of the Union—at least where slavery is tolerated—that a colored person, though free, cannot be a witness where the parties are white persons. (Wheeler on Slavery, p. 194.) In Kentucky, the courts have said that 'although

Ann. L. p. 61. Sec. 1. "That every person, except a negro, whose grandfather or grandmother shall have been negro, although all his progenitors except those descending from the negro shall have been white persons, shall be deemed a mulatto; and every person not a full negro, who shall be one fourth or more negro, shall be deemed a mulatto." The act required those already resident to prove freedom and take a certificate. Declares punishment by fine for introducing any such.<sup>1</sup> Not to apply to negroes employed on boats or to servants of travelers. An act of 1845 permits longer stay of free negroes, servants of travelers. R. S. of 1848, c. 75. —. *An act to punish persons for enticing away slaves.*

**1849.**—An. L. p. 61; 1850–51, p. 88; and 1854, p. 94, are acts amending. Rev. St. c. 153, on the apprehension and sale of runaway slaves.

**1850,** Nov. 22. *An act to prohibit the publication, circulation, or promulgation of the abolition doctrines.* Ann. L. p. 22. Sec. 1. "That if a free person by speaking or writing maintain that owners have not a right of property in their slaves, he shall be confined in jail not more than one year and fined not exceeding one hundred dollars. 2. That if any free person write, print, or cause to be written or printed any book or other writing with intent to advise or incite negroes in this State to rebel or make insurrection or inculcating resistance to the right of property of masters in their slaves, or if he shall with intent to aid the purpose of any such book or writing knowingly circulate the same, he shall be confined in the penitentiary not less than one nor more than five years." Rev. St. pp. 344, 345.

**1853.**—Acts to prevent sale of liquors to slaves, and by free negroes and slaves. Ann. L. pp. 71, 120.

**1854.**—Act repealing all laws inflicting stripes as a pun-

free persons of color are not parties to the social compact, yet they are entitled to repose under its shadow.' *Ely v. Thompson*, 3 A. K. Marshall, 70. And again, in *Amy v. Smith*, 1 Little, 327, that prior to the adoption of the Constitution," &c. See *ante*, pp. 14, 16, where these cases are cited. And compare the doctrine of *State v. Levy*, 5 La. Ann. *Ante*, p. 164, n.

<sup>1</sup> *Charles v. The State*, 6 Eng. 390; *Pleasant v. The State*, 8 Eng. 360:—The legislature may punish a negro capitally for an offence which is not so severely punished when committed by a white (as in case of rape).



ishment upon white persons, and declaring whites, for concerting, &c., with negroes, punishable by fine and imprisonment. Ann. L. p. 38.

**1858.**—In the Revised Statutes of this year, the titles *Criminal law*, *Freedom* (relating to the prosecution of suits for freedom'), *Free negroes and mulattoes*, *Slaves*, *Patrols*, *Fugitives from justice*, contain a re-enactment of the earlier provisions.

**1858-9**, c. 20. *An act to prevent persons from hiring slaves to work and perform manual labor on the Sabbath day, without the consent of the owner.* —, c. 34. An act punishing free persons, for harboring or concealing slaves, by imprisonment from one to five years. —, c. 68. *An act to prohibit the emancipation of slaves.* —, c. 151. *An act to remove the free negroes and mulattoes from this State.* Such persons to be warned by sheriff; not leaving, are to be hired out, "to be held as slaves are now held" for a year, and not leaving thirty days after its expiration, to be sold as a slave, after trial and verdict of a jury on the facts. Negroes between seven and twenty-one years to be seized and hired out. Such must leave thereafter. Negroes wishing to remain may choose master, &c., who must give bond not to allow such negroes to act as free. County courts to provide for the aged and infirm negroes out of the proceeds of sales of free negroes, &c. —, c. 195. An act to prevent employment of free negroes on steamboats navigating any of the waters of this State; declares employing such or permitting them to travel, a misdemeanor. —, c. 225. Abolishing imprisonment of slaves for crimes, and substituting punishment by whipping.

#### § 569. LEGISLATION OF THE STATE OF IOWA.

The territory included in the State of Iowa may be considered part of that Louisiana or Canada in which the colonial law of France had had a territorial extent.<sup>1</sup> As part of that Louisiana purchase it appears to have been within the District

<sup>1</sup> See *Jackson v. Bob*, 18 Ark. 399; *Daniel v. Guy, et al.*, 19 Ark. 121.

<sup>2</sup> *Taney, Ch. J.*, 19 Howard, 431.

of Louisiana in 1804,<sup>1</sup> and within the Territory of Missouri in 1812.<sup>2</sup> As such it was within the terms of the act of Congress of March 6, 1820,<sup>3</sup> by the 8th section of which it was enacted, "that in all the territory ceded by France to the United States, under the name of Louisiana, which lies north of thirty-six degrees and thirty minutes north latitude, not included within the limits of the State contemplated in this Act [Missouri], slavery and involuntary servitude otherwise than in the punishment of crimes whereof the parties shall have been duly convicted shall be and is hereby forever prohibited. *Provided, always,* that any person escaping into the same from whom labor or service is claimed in any State or Territory of the United States, such fugitive may be lawfully reclaimed and conveyed to the person claiming his or her labor as aforesaid."

On the admission of Missouri the remaining territory appears to have been under no local legislative authority until, by act of June 28, 1834,<sup>4</sup> the portion north and east of the Missouri and White Earth Rivers was made part of the Michigan Territory, and by act of April 30, 1836,<sup>5</sup> of Wisconsin Territory, until 1838, when the territorial government of Iowa, including all of Wisconsin Territory west of the Mississippi, was established by act of Congress, June 12, 1838.<sup>6</sup> The 12th section of this act declared that "the inhabitants of the said Territory shall be entitled to all the rights, privileges, and immunities heretofore granted and secured to the Territory of Wisconsin and its inhabitants, and the existing laws of Wisconsin shall be extended over said Territory so far as the same be not incompatible with the provisions of this act," subject to alteration by the local legislative authority. Independently of the act of 1820 expressly prohibiting slavery, it would ap-

<sup>1</sup> *Ante*, p. 155.

<sup>2</sup> *Ante*, p. 167.

<sup>3</sup> *Ante*, p. 168. As the questions of admitting Missouri, or any other State formed in the Louisiana purchase, as a slave State, had long been the subject of political controversy, the enactment of this statute became popularly designated the *Missouri Compromise*, of which the prohibition of slavery was repealed by sec. 14, 32, of the act of May 30, 1854 (*ante*, vol. I. p. 563), and declared unconstitutional in *Dred Scott's* case. See *ante*, vol. I. p. 528.

<sup>4</sup> *Ante*, p. 139, n. 1.

<sup>5</sup> *Ante*, p. 141, n.

<sup>6</sup> *An act to divide the Territory of Wisconsin and to establish the territorial government of Iowa.* V. Stat. U. S. 235; 9 B. & D. 770. Sec. 4. Vests the legislative power in the governor and assembly. 5. Limits the franchise to whites.



pear that slavery would have been prohibited by these several acts of fundamental law; supposing that the power of Congress had not been limited in this respect.

**1838-9.**—*An act to regulate blacks and mulattoes*, Sess. L. p. 65. Sec. 1. Certificate of freedom under seal required of blacks coming to reside; bond and security required. 2. Proceeding against negroes failing in this respect, and provision for hiring out such persons. 3, 4. Penalties. 5. "That the right of any person or persons to pass through this Territory with his, her, or their negroes and mulattoes, servant or servants, when emigrating or traveling to any other State or Territory, or country, or on a visit, is hereby declared and secured." 6. That in case any person or persons, his or their agent or agents, claiming any black or mulatto person that now is or hereafter may be in this Territory, shall apply to any judge of the district court, or justice of the peace, and shall make satisfactory proof that such black or mulatto person or persons is or are the property of him or her who applies, or for whom application is made, the said judge or justice is hereby empowered and required by his precept to direct the sheriff or constable to arrest such black or mulatto person or persons, and deliver the same to the claimant or claimants, his or their agent or agents, for which service the sheriff or constable shall receive such compensation as they are entitled to receive in other cases for similar services. No provisions of this character appear in the Code of 1851, and they seem to be repealed by the general repealing clause. *Ib.* p. 8. But see law of 1851, c. 72, —. *An act defining crimes and punishments*. Sess. L. 147, sec. 25. *Kidnapping*. "If any person or persons shall forcibly steal, take, or arrest any man, woman, or child in this Territory, and carry him or her into another country, State, or Territory, or who shall forcibly take or arrest any person or persons whatsoever, with a design to take him or her out of this Territory, without having legally established his, her, or their claim according to the laws of this Territory or of the United States, shall, upon conviction thereof, be punished by a fine not exceeding one thousand dollars, and by imprisonment not exceeding ten years." Sec. 2588 of the Code of 1851, defining



and punishing kidnapping, makes no reference to claim of persons owing service or labor.

**1839-40.**<sup>1</sup> c. 25. *An act regulating marriages.* Sec. 13. "All marriages of white persons with negroes and mulattoes are declared to be illegal and void." No such declaration appears in the provisions of the Code of 1851, on marriage.

**1846,** May 18. Constitution of the State of Iowa declared by a Convention. Art. II. sec. 1. "All men are, by nature, free and independent, and have certain inalienable rights, among which are," &c. Art. III. sec. 1. Limits the right of suffrage to whites.<sup>2</sup>

**1851,** c. 72. *An act to prohibit the immigration of free negroes into this State.* Sec. 1. Negroes coming are to be notified to leave, and, on non-compliance, are to be fined, and committed until they pay fine and costs, or consent to leave the State. 3. Free negroes now living in the State, "having complied with the laws now in force," are permitted to remain. 4. "On the trial of any free negro under this act, the justice or judge shall determine from, and irrespective of his person, whether the person on trial comes under the denomination of free negro or mulatto." —, Feb. 5. By the Code of this date, § 2388, "Every human being of sufficient capacity to understand the obligation of an oath is a competent witness in all cases both civil and criminal, except as herein otherwise declared. But an Indian, a negro, a mulatto, or black person shall not be allowed to give testimony in any cause wherein a white person is a party."<sup>3</sup>

#### § 570. LEGISLATION OF THE STATE OF MINNESOTA.

The territory included within this State had been included within the Territory of Iowa until the admission of that State,

<sup>1</sup> 1840, c. 33. An act to authorize the arrest and detention of fugitives of justice from, &c., refers to the governor, as if already sufficiently qualified to deliver up, by the laws of the United States. The governor is authorized by the Code of 1851, § 3283.

<sup>2</sup> Act of Congress, March 3, 1845, *for the admission of the States of Iowa and Florida into the Union*, V. Stat. U. S. 742, 10 B. & D. 695, recites that territorial conventions in each had formed Constitutions for State governments which were republican, &c.

<sup>3</sup> On the construction of this provision, see *Motts v. Usher*, 2 Iowa, 82. An attempt has been made to repeal this provision, but I am unable to say whether it became a law.

in 1846.<sup>1</sup> The laws of Wisconsin Territory were continued by sec. 12 of the act establishing the territorial government<sup>2</sup> in 1849.

**1851.**—Revised Statutes. No distinction of color is made in declaring capacity for the marriage contract, nor in declaring the competency of witnesses. There is no provision respecting persons claimed as fugitives from labor. Ch. 100, sec. 42, amended in 1852. Amendments to R. S., p. 23, declares the punishment of kidnapping, with intent to sell as a slave or hold to service, &c., any negro, &c.<sup>3</sup> The same statutes appear included in the Public Statutes, &c., ed. 1859.

**1858.**—A State Constitution adopted.<sup>4</sup> Art. I., a Bill of Rights. Sec. 2. "No member of this State shall be disfranchised," &c. "There shall be neither slavery nor involuntary servitude in the State, otherwise than in the punishment of crime, whereof the party shall have been duly convicted." 16. That the enumeration of rights shall not impair others retained by and inherent in the people. There is no attribution of rights to all men as natural and inherent. Art. VII. sec. 1, 2, limit the elective franchise to "whites, and persons of Indian or mixed white and Indian blood, who have adopted the habits of civilization."

#### § 571. LEGISLATION OF NEBRASKA TERRITORY.

The laws of the District and Territory of Louisiana and of the Territory of Missouri may have had territorial as well as personal extent in the territory now divided between the Territory of Nebraska and the State of Kansas, if included in the Louisiana purchase. The force of that law to maintain slavery, as the condition of a domiciled inhabitant, would how-

<sup>1</sup> *Ante*, p. 177.

<sup>2</sup> March 3, 1849. *An act to establish the territorial government of Minnesota.* IX. Stat. U. S. 403. Sec. 6 defines the legislative body, and reserves to Congress power to disallow the territorial acts.

<sup>3</sup> Ch. 111. *Of demanding fugitives from justice.* Sec. 2 authorizes the governor to surrender such persons on demand. See the same in Ch. 100 of Public Statutes, ed. 1859.

<sup>4</sup> May 11, 1858. *An act for the admission of the State of Minnesota into the Union.* XI. Stat. U. S. 285. Sec. 1 recites an act of Congress of Feb. 26, 1857, authorize the formation of a State government; the adoption of the State constitution. Sec. 3 extends the laws of the United States over such State.



ever have been destroyed by the prohibition of slavery north of  $36^{\circ} 30'$ , in the eighth section of the act of 1820, if Congress had had the power to prohibit it.

By the 14th section of the act organizing the Territories Nebraska and Kansas,<sup>1</sup> the 8th section of the act of March 6th, 1820, is "declared inoperative and void." But whether slavery, or any condition of involuntary servitude, could thereupon have been judicially recognized as lawful, without some legislative sanction from the local government, may be questioned, in view of the explanatory words immediately following those above quoted: "It being the true intent and meaning of this act not to legislate slavery into any Territory or State, nor to exclude it therefrom, but to leave the people thereof perfectly free to form and regulate their domestic institutions in their own way, subject only to the Constitution of the United States." From the *proviso* immediately following, it appears that the old law of Louisiana could not have been relied on to maintain slavery as a status supported by the local law, or law having territorial extent therein. By this it is "*Provided* that nothing herein contained shall be construed to revive or put in force any law or regulation which may have existed prior to the act of the sixth of March, 1820, either protecting, establishing, prohibiting, or abolishing slavery."<sup>2</sup>

<sup>1</sup> By act of Congress, 1854, *An act to organize the Territories of Nebraska and Kansas*. X. St. U. S. 277. By sec. 1, the line of  $40^{\circ}$ , from the western boundary of Missouri to the Rocky Mountains, is made the dividing line between these two Territories. By sec. 19, the line of  $37^{\circ}$  is the most southern line of the Kansas boundary—the whole being thus, by  $6'$ , north of the line of the Missouri Compromise.

<sup>2</sup> It is declared in the sixth section "that the legislative power of the Territory shall extend to all rightful subjects of legislation consistent with the Constitution of the United States and the provisions of this act"—with certain exceptions not material in connection with law of personal condition. In view of the opinions of the six justices of the Supreme Court in *Dred Scott's* case (*ante*, Vol. I. p. 558), the question arises whether (supposing Congress to have intended in the 14th sec. to give the local Legislature the power to maintain or exclude slavery) such power can be possessed by the local Legislature,—whether the powers of such Legislature are such only as may be derived from Congress, and consequently not greater than those of Congress,—or whether from the inhabitants of the Territory they derive an inherent local sovereignty, like that held by the people of a State. Among the printed arguments in favor of the possession of this power by the territorial governments may be noticed especially, *The dividing line between Federal and Local Authority; Popular Sovereignty and the Territories*. By Stephen A. Douglas. Harper's Magazine for Sept., 1859. The writer's concluding principle



Under the Dred Scott decision, declaring the prohibition of 1820 null and void, it may be urged that the law of Louisiana Territory, as having always had territorial extent in Nebraska and Kansas, sustains slavery therein, until abrogated by competent legislative authority.

But if the act of 1820 is to be sustained as a legitimate exercise of power, or if the law of Louisiana is held never to have had such force,<sup>1</sup> then, under the legislation of 1854, above recited, these Territories may be taken to have had no law at that date, having territorial extent therein, to determine the status of persons, and to have been in that respect in the condition of this whole country at the time of the first settlement; and the question arises whether, under this view, slavery is a lawful status in these Territories, independently of some legislation of competent authority.

The question whether, in this view, the condition of slavery, or any involuntary servitude, and the correlative rights of the master, in the case of owner and slave coming from some slaveholding jurisdiction, should be judicially recognized and maintained between them on becoming domiciled inhabitants, is a question of the local municipal or internal law of the Territory, because it is law applying to residents. But it is one which is to be decided as a question of international private law, or of *quasi*-international private law, accordingly as there may or may not be a law resting on national authority to support that condition and those rights in such case.

It is evident that the doctrine that slaves are property recognized by the Constitution of the United States acting as a bill of rights, the doctrine maintained in Dred Scott's case by Judges Taney, Wayne, Grier, and Daniel, or the doctrine

is, "that under our political system, every distinct political community, loyal to the Constitution and the Union, is entitled to all the rights, privileges, and immunities of self-government in respect to their local concerns and internal polity, subject only to the Constitution of the United States."

<sup>1</sup> In the Preface, signed Samuel A. Lowe, Superintendent, p. i., to Kansas Statutes of 1855, published as from the Shawnee Mission School, Oct., 1855, pp. 1088, it is argued, with reference to its bearing on the lawfulness of slavery, in that Territory, that as there were no new settlements therein of a permanent nature until very recently, there is no occasion to consider the French law of Louisiana.

of the extension of the laws of the slaveholding States into the Territories, as a consequence of the political right of the States to equal benefit in the national territory, as maintained by Judge Campbell, or the doctrine that the treaty of cession maintains slavery in this Territory, as held by Judge Catron,<sup>1</sup> would appear to maintain the relation of master and slave in such case, until annulled by competent legislative authority.

According to the views maintained in the first volume, slavery now rests on the local law of some one State, or several jurisdiction of the United States, and not upon law having national authority and national extent.<sup>2</sup> Neither does the doc-

<sup>1</sup> See Vol. I. pp. 558, 559.

<sup>2</sup> See particularly *ante*, §§ 512-520. The decision of the majority of the Court in *Dred Scott's* case is constantly cited as a judicial affirmation of the doctrine that any one who is held as a slave in a State may be carried to *any territory* of the United States and held there as a slave. Mr. Buchanan, in the Message, December, 1859, congratulated Congress on "the final settlement, by the Supreme Court of the United States, of the question of slavery in the Territories. \* \* The right has been established of every citizen to take his property of any kind, including slaves, into the common territories belonging," &c. (See also in note to Vol. I. p. 559, extract from Message of December, 1857.) In that case it was admitted that if the plaintiff was slave, he was such in virtue of the local law of Louisiana Territory, operating because unrepealed by the Act of 1820. The doctrine upon which Judges Taney, Wayne, Grier, and Daniel relied—that slaves are recognized as property by the Constitution—might require them, in consistency, to affirm the legality of slavery in all territory of the United States. But, unless Judge Catron can be classed as holding the same doctrine (see Vol. I. p. 558, 559), it did not have a majority of the Court. In § 493 of this work, it is said: "It was held by a majority of the Court that Congress has no power to abolish or prohibit slavery in the Territories of the United States." This was in accordance with the popular understanding of the decision. It should have been stated—*has no power to abolish or prohibit slavery in the Louisiana Territory*. Judge Catron's opinion rests on the treaty of cession. It is true that Judge Campbell's doctrine, that slavery was protected in the territory by the operation of the laws of the slaveholding States (Vol. I. p. 535), would seem equally applicable to any Territory; thus making five justices who, though not all for the same reason, might consistently maintain slavery in all the Territories. The received understanding of the decision is probably derived more from the *captions* to the report (said by Mr. Benjamin, Senate, May 22, 1860, to have been drawn by the Chief Justice), than from the opinions themselves. In most of these *captions*, territory of the United States is spoken of generally; giving the impression that the *judgment* of the Court would apply to any Territory. The word Louisiana is not mentioned. But the important *caption*, IV. subd. 5, reads, "The act of Congress, therefore, prohibiting a citizen of the United States from taking with him his slaves when he removes to the territory in question to reside, is an exercise of authority over private property which is not warranted by the Constitution, and the removal of the plaintiff, by his owner, to that Territory, gave him no title to freedom." By "the territory in question," the writer probably intended to particularize the Louisiana Territory; but probably, also, few readers would distinguish it from the territory in general which, in the preceding *captions*, had been spoken of.



trine of the equality of the States in respect to the territory of the United States sanction any such judicial extension of the laws of the slaveholding States;<sup>1</sup> nor can the guarantee of property to the inhabitants of French Louisiana apply to the owners of slaves afterwards brought into the Territory, because slaves are not property by universal jurisprudence or *law of nations* (*jus gentium*), but only by particular law (*jus proprium*), nor could this guarantee extend to any persons other than the original inhabitants.<sup>2</sup>

The question, then, is not decided by national law having *quasi*-international extent, but by principles of international jurisprudence, as set forth in the first chapter of this work; though they take effect as the municipal or internal law of these Territories, since the persons to whom they are applied are supposed to have abandoned their former domicile and to have obtained a new one in the Territory.

The question is, of the realization in the forum of jurisdiction of rights and their correlative obligations which became existent under the law of another forum.<sup>3</sup>

In the first place, it is herein held, that the principle which

<sup>1</sup> See *ante*, §§ 502-505.

<sup>2</sup> See *ante*, Vol. I. pp. 539, 559, 590. The argument cannot be here fully examined. It rests on the construction of the third art. of the treaty. *Ante*, p. 155. Judge Catron, 19 Howard, 524:—"Louisiana was a province where slavery was not only lawful, but where property in slaves was the most valuable of all personal property. The province was ceded as a unit, with an equal right pertaining to all its inhabitants, in every part thereof, to own slaves. It was to a great extent a vacant country, having in it few civilized inhabitants. No one portion of the colony, of a proper size for a State of the Union, had a sufficient number of inhabitants to claim admission into the Union. To enable the United States to fulfill the treaty, additional population was indispensable, and obviously desired with anxiety by both sides, so that the whole country should, as soon as possible, become States of the Union. And for this contemplated future population, the treaty as expressly provided as it did for the inhabitants residing in the province when the treaty was made. All these were to be protected 'in the meantime;' that is to say, at all times, between the date of the treaty and the time when the portion of the Territory where the inhabitants resided was admitted into the Union as a State." The argument, at the best, rests entirely on the assumption that inhabitants of the Territory were not "incorporated into the Union" of the United States, in the sense of the treaty, the moment they became fully within the organized sovereignty of the national government. Again, what is protection? Why has not the entire French law been retained in the Territory? The like idea of protection, as guaranteed to the *then* slaveowners in the Northwest Territory, had been taken in *Merry v. Tiffin*, and *Theoteste v. Chouteau* (*ante*, p. 114, note 1). But, according to this theory, the slave Code in these Territories ought to be as benevolent towards the slave and the free black as was the French Code of Louisiana. See the abstract of

a law.

§ 68, and note.



obtained in the first settlement of America, that the laws of the colonizing country accompany the colonist to his new domicile, can only apply where the place colonized and the place from which the colonist came are under the same sovereign, having equal power in either place to determine the status of persons;<sup>1</sup> that it does not apply here because the Territory is under the sovereignty of the integral people of the United States,<sup>2</sup> while the several States have no jurisdiction therein, and are in this respect like countries utterly foreign to the United States.<sup>3</sup>

Also, the doctrine of recognizing "personal statutes," or laws of status and condition, is one which really obtains only as between provinces equally under one sovereign, and has no support in international jurisprudence,<sup>4</sup> except as it is identified with the following view:—

In this inquiry it is first to be ascertained, whether the right claimed, and its correlative obligation, is one now resting on universal jurisprudence—the *law of nations*—in that sense. It is herein held, that it does not now rest thereon, and cannot be judicially recognized as other relations or conditions ascribable to such jurisprudence may be recognized.<sup>5</sup>

The only other question is, whether the right and obligation may be judicially maintained on the principle of the continuation of any relation between persons coming from another jurisdiction which has existed by the law of that forum (mis-

<sup>1</sup> *Ante*, Vol. I. p. 116.

<sup>2</sup> That is, if not under a local "popular sovereignty," according to the theory advocated by Mr. Douglas.

<sup>3</sup> It will be remembered that Judge Campbell, in 19 Howard, 516, held that the States may thus extend their laws "determining property" into the Territories, using the national government as their agent. *Ante*, Vol. I. pp. 535, 594-596.

<sup>4</sup> *Ante*, § 107.

<sup>5</sup> See *ante*, Vol. I. p. 574, and the sections referred to in the notes to that page. In recent arguments based on the opposite doctrine, it is very common to allude to the idea, that negro slaves are recognized in this country as *persons* and not as *property*, as a heresy which has grown up in the northern States during the last twenty-five or thirty years. The legislation and decisions cited in the preceding pages may be referred to to decide whether, in all the States, the personality of the slave had not been more or less recognized from the colonial period until a time when the extension of slavery into parts of the continent, wherein it was not recognized by local law, became the object of a section of the country. Then probably was foreseen the advantage in maintaining that slavery is something immutable, the same of necessity in all jurisdictions, the chattel condition which may be property by universal jurisprudence (*ante*, § 112), as such to be carried everywhere, under the national dominion, and there protected by the national bill of rights.

named, the principle of comity), provided no right or obligation inconsistent with the rights and obligations constituting that relation is attributed universally, or to all natural persons, by the local law of the forum of jurisdiction.<sup>1</sup>

Here it may be necessary to determine the political source of the law prevailing in the Territory from which such an universal attribution of rights and obligations can proceed; i. e., whether that law rests on the authority of the nation or on that of a local sovereignty. There are, doubtless, many who think that there is a law resting on national authority which attributes personal liberty to every man, in all jurisdictions under the national dominion wherein there is no received local law to determine personal status. Some probably are of opinion that the propositions in the Declaration of Independence have this effect in such case, even if not also everywhere under the exclusive dominion of national authority.<sup>2</sup> The doctrine of Judge Taney's opinion in *Dred Scott's* case is of course utterly inconsistent with such views. But, without admitting the correctness of that doctrine, the fact that involuntary servitude is recognized, as a legal condition under State laws, by the provision in the Constitution for the delivery of fugitives from labor on claim,—and the fact, that it is a legal condition in other places under the exclusive jurisdiction of the national government,—is enough to exclude the idea of any such universal attribution by the national law of the right of personal liberty in these Territories.

As there was certainly no law, proceeding from any local source, attributing liberty universally, the question, whether such an attribution from that source should prevent the judicial recognition of slavery in the case of a person brought from another jurisdiction, could not have arisen before some act of the local Legislature attributing liberty to all natural persons.<sup>3</sup>

From these considerations it appears that, independ-

<sup>1</sup> *Ante*, §§ 88, 114, 523.

<sup>2</sup> See Vol. I. pp. 467-471.

<sup>3</sup> As it might have arisen, or may yet perhaps arise in New Mexico or other Territory in which, before its being under the dominion of the United States, the local law prohibited slavery; or the question may arise in Nebraska, under the act of the Legislature of 1860, which is reported to have prohibited slavery.



ently of the doctrine that slaves are *property* recognized by the Constitution or by a national common law, the relation between master and slave coming to the Nebraska or Kansas Territory from a slaveholding State should have been judicially recognized in those Territories.<sup>1</sup> Whether it might not thereafter have been annulled by the legislative authority, either of Congress or the territorial government, is a distinct inquiry, which has herein been sufficiently considered already.<sup>2</sup>

There are, however, many jurists who would say, that a "natural law" should here be recognized, declaring each person to be free who is not placed under the control of another by some positive law, meaning a law historically shown to exist, either by judicial decisions or by positive enactment, having before had recognition within the forum of jurisdiction—relying, perhaps, on Lord Mansfield's reasoning in *Somerset's case*. But, according to the views stated in the first two chapters of this work, these international principles do, of themselves, constitute that "positive law" which is here referred to; and this view is fully illustrated in the historical part of the first volume.<sup>3</sup>

<sup>1</sup> In Sec. 9 of the act of Congress organizing these Territories it is provided, that appeals shall lie from the Supreme Court of the Territory to the Supreme Court of the United States, where the value in controversy exceeds one thousand dollars, "except only that in all cases involving title to slaves, the said writs of error or appeals shall be allowed and decided by the said Supreme Court, without regard to the value of the matter, property, or title in controversy; and except also that a writ of error or appeal shall also be allowed to the Supreme Court of the United States, from the decision of the said Supreme Court created by this act, or of any judge thereof, or of the district courts created by this act, or of any judge thereof, upon any writ of habeas corpus involving the question of personal freedom. Provided that nothing herein contained shall be construed to apply to or affect the provisions of" the acts of Congress of 1793 and 1850, respecting fugitives from justice and from labor. Sec. 27 contains similar provisions for Kansas.

<sup>2</sup> In ch. XVI.

<sup>3</sup> In *Observations on Senator Douglas' views of Popular Sovereignty*, as expressed in *Harper's Magazine* for Sept., 1859, by Judge Black, second ed., in stating the legal basis of slavery in the Territories, p. 4, the writer gives this as his first proposition: "1. It is an axiomatic principle of public law, that a right of property, a private relation, condition, or *status*, lawfully existing in one State or country, is not changed by the mere removal of the parties to another country, unless the law of that other country be in direct conflict with it. For instance: a marriage legally solemnized in France is binding in America; children born in Germany are legitimate here if they are legitimate there; and a merchant who buys goods in New York, according to the laws of that State, may carry them to Illinois and hold them there under his contract. It is precisely so with the *status* of a negro carried from one part of the United States to another; the question of his freedom or servitude depends on the law of the place where he came from, and depends on that alone, if there be no conflicting law at the place to which he goes



**1857.**—In the Code of procedure of this year, Sess. L. p. 107, c. 33, § 1. "But an Indian, a negro, or mulatto, or black person shall not be allowed to give testimony in any cause."

**1858.**—A criminal Code, enacted by the territorial Legislature, ch. 1, sec. 53, defines kidnapping. 54. Declares the forcible carrying out of the Territory, "without having established a claim according to the laws of the United States," to be kidnapping, and declares the punishment. 55. Declares the punishment for enticing colored people, with a purpose to sell as slaves. Sess. L. p. 49.

**1860.**—A bill prohibiting slavery in the Territory is reported to have been enacted by the local assembly.

#### § 572. LEGISLATION OF THE STATE OF KANSAS.

**1855**, c. 48 of Statutes enacted by the first territorial Legislature, in the time of Governor Reeder, which met at the Shawnee Manual-Labor School, after having passed, by two thirds, an act to remove thither the seat of government,<sup>1</sup> *Crimes and punishments*. Sec. 31. Punishment of rape when committed by a negro or mulatto. 32. Punishment of white person aiding in such rape. 40-43. Punishment of kidnapping, &c., "any free person, or persons entitled to freedom." —, c. 74. An act to enable persons held in slavery to sue for their

or is taken. The Federal Constitution therefore recognizes slavery as a legal condition wherever the local governments have chosen to let it stand unabolished, and regards it as illegal wherever the laws of the place have forbidden it. A slave being property in Virginia remains property, and his master has all the rights of a Virginia master wherever he may go, so that he go not to any place where the local law comes in conflict with his right. It will not be pretended that the Constitution itself furnishes to the Territories a conflicting law. It contains no provision that can be tortured into any semblance of a prohibition."

The writer has not here distinguished between the judicial recognition of rights and duties existing in relations attributable to universal jurisprudence and the recognition of others, though not so attributable, on the doctrine of comity, so-called. In other places, as pp. 9, 10, 23, he assumes, that whatever a State may recognize as property must be regarded as property in every other forum. And it would appear that he would recognize slavery in the Territory on either principle. But, as stated in the text, though slaves cannot now be internationally recognized as property, because, if property anywhere, they are such in virtue of some particular law (*jus proprium*), and not by universal jurisprudence (*jus gentium*), yet the right of the master, and the obligation of the slave, may be maintained in the new forum by the doctrine above stated.

In his *Reply to Judge Black's Observations*, Senator Douglas speaks very deservingly of the doctrine contained in the paragraph cited.

<sup>1</sup> See preface, p. vii., to Kansas Laws of 1855.

freedom. Sec. 1. "Any person held in slavery may petition," &c. 12. "If the plaintiff be a negro or mulatto, he is required to prove his right to freedom." 13. "If the plaintiff's right to freedom be established," &c. —, c. 75. *An act relative to fugitives from other Territories or States.* The first part relates to fugitives from justice.<sup>1</sup> Sec. 19-30 relate to fugitives from labor. 19. On proof of title, claimant shall be entitled to a warrant, returnable before any judge of a court of record or justice of the peace, who shall give a certificate, in case of being satisfied that the person claimed is a fugitive from labor, which shall authorize the claimant to remove him. If the person claimed is discharged by the court or magistrate, "the person at whose instance he was arrested shall pay him one hundred dollars, the costs and expenses incurred by him, and all damages he may have sustained." 28. "No person shall take or remove any fugitive from this Territory, or do any act towards such removal, unless authorized so to do pursuant to the provisions of this act."<sup>2</sup> —, c. 96. *An act adopting the common law of England and all statutes of a general nature prior to 4 James I. not repugnant to the Constitution of the United States, and the act entitled "an act to organize the Territory of Nebraska and Kansas," or any statute of the Territory.* —, c. 108. On marriages. Sec. 3. All marriages of white persons with negroes or mulattoes are declared to be illegal and void. —, c. 151. *An act to punish offences against slave property.* Sec. 1. Persons, bond or free, raising insurrection of slaves—punished with death. 2. Aiding—punished with death. 3. Persuading slaves, "by speaking, writing, or printing," to rebel, &c.,—a felony, punishable with death. 4. Punishment for decoying away slaves. 5. Punishment for assisting slaves to run away. 6. A person who shall carry away from any other Territory or State of the Union any slave, and bring into this Territory with intent to effect the freedom of the slave or to deprive the owner of his services, shall be deemed guilty of grand larceny. 7. Felony to entice slave

<sup>1</sup> By sec. 1. The governor is authorized to deliver up a fugitive on demand being made according to the act of Congress.

<sup>2</sup> See the law of 1835, of Missouri, from whose statute book this Code of Kansas is popularly said to have been taken.



from service, in this Territory. 8. Punishment for concealing slave. 9. Punishment for rescuing slave from officer. 10. Penalty on officer who refuses to aid in the capture of slaves. 11. Punishment for publishing and circulating incendiary documents. 12. "If any free person, by speaking or writing, assert or maintain that persons have not the right to hold slaves in this Territory, or shall introduce into this Territory, print, publish, write, circulate, or cause to be introduced into this Territory, written, printed, published, or circulated in this Territory, any book, paper, magazine, pamphlet, or circular, containing any denial of the right of persons to hold slaves in this Territory, such person shall be deemed guilty of felony, and punished by imprisonment at hard labor for a term of not less than two years." (This section repealed by act of Feb. 5, 1857, entitled "*An act repealing the twelfth section of 'an act to punish,'*" &c.) 13. "No person who is conscientiously opposed to holding slaves, or who does not admit the right to hold slaves, in this Territory, shall sit as a juror on the trial of any prosecution for any violation of any of the sections of this act."

**1858**, Feb. 9. An act repealing the above. Sess. Laws, c. 62.

**1861**.—Constitution of the State. This is, I believe, the Constitution framed at Wyandot, July, 1859, under a call from the territorial Legislature; it is reported to contain a prohibition of slavery.<sup>1</sup>

<sup>1</sup> A bill for the admission of Kansas was signed by the President, Jan. 29, 1861, while these sheets were being printed. A bill for the admission of the State with this Constitution was passed, in the Ho. of Rep., Apr. 11, 1860, but rejected in the Senate, June 7, 1860. The people of the Territory, by vote of Aug. 3, 1858, had rejected the so-called "Lecompton" Constitution (submitted under act of Congress of May 4, 1858. XL U. S. St. 269). The same had been voted on, Dec. 21, 1857, in the form prescribed by the Convention which passed it, and, Jan. 4, 1858, in the form prescribed by the territorial Legislature. On the first of these votings it had received the assent of a majority "with slavery;" on the second, was rejected by a larger majority of a larger number of voters. This Constitution contained, under title *Slavery*—Sec. 1. "The right of property is before and higher than any constitutional sanction, and the right of the owner of a slave to such slave and its increase is the same, and is inviolable as the right of the owner of any property whatever." 2-4. Provides that the Legislature shall not abolish slavery without consent of owners, or compensating them; but may prohibit slaves being brought by immigrants, and other provisions, as to power over treatment of slaves, and trials, common in the slaveholding States. At the date (Dec. 17, 1857; 3d and extra session) of submitting this Constitution to popular vote, the Legislature had



## § 573. LEGISLATION OF THE INDIAN TERRITORY.

The territory included between the States Arkansas and Texas, on the east and south, and the Territories Kansas and New Mexico, on the north and west, is known as the Indian Territory; being exclusively inhabited by tribes or "nations" of Indians, settled therein under treaties with the national government, but having a recognized power of self-government identified by continuation with their aboriginal independence.<sup>1</sup>

It might be questioned, whether any right guaranteed against organized governments, either State or national, by the Constitution of the United States, would derive any support from the same instrument as against the authority of these tribes, within their Territory. It might be doubted, whether any law historically derived from the colonizing Europeans can have any territorial extent in this district. Conditions of involuntary servitude appear, however, to have been always recognized among the Indians, as they have universally been among barbarian societies. The tribes who formerly occupied lands within the southernmost States—the Choctaws, Cherokees, &c.—have also held negro slaves, under their customary law, before their removal to their present locality.<sup>2</sup>

The governments of the Choctaws, the Cherokees, and probably of other tribes, are organized under written Constitutions, by which the functions of power are distributed as in

passed *resolutions* reaffirming the *People's Constitution*, framed at Topeka, the 23d of October, 1855, in which they recite that, in the spring of 1855, the first legislative assembly "was, by force and violence, seized upon by people foreign to our soil, and a Code of laws enacted, highly unjust and oppressive, and calculated to drive off or enslave the actual settlers of said Territory, and to fix upon them an institution revolting to a majority of the bona fide citizens of the Territory." Session Laws, p. 20.

The State, as admitted, is understood to be bounded on the north by the line of 41°; on the west by the meridian 23° west of Washington. For the portion of territory lying west, for which the name of "Colorado" is proposed, a territorial government is now about to be organized.

<sup>1</sup> Leading cases exhibiting the relation between the Indian tribes and the United States, are *Johnson, &c., v. McIntosh*, 8 Wheat. 543; *Cherokee Nation v. the State of Georgia*, 5 Peters, 1; *Worcester v. The State of Georgia*, 6 Peters, 515; *United States v. Rogers*, 4 How. 567. The principal act of Congress, is that of June 30, 1834. IV. St. U. S. 729, and sup. of March 3, 1847. See also notes to Lec. LI. of Kent's Comm.

<sup>2</sup> *Jones v. Laney*, 2 Texas, 342:—That the Chickasaw Indians held slaves in Georgia under their own independent legislative power.

the States. That of the Choctaw Nation, dated January, 1857, may probably be taken as a representative of all. Art. 1, sec. 1, provides, that "all freemen, when they form a social compact, are equal in rights," &c. Other sections attribute rights to "all citizens." Art. VII., *slaves*; provides that the general council shall have no power to pass laws for the emancipation of slaves, except, &c., as is provided in the Constitutions of Arkansas and of most of the southwestern States. See Laws of the tribe, printed at Fort Smith, Arkansas, in 1858, pp. 224, 8vo.

§ 574. LEGISLATION OF THE STATE OF FLORIDA.

The territory included within the present State of Florida was ceded to the United States by the treaty of Feb. 2, 1819,<sup>1</sup> of which the Sixth Article provided—"The inhabitants of the territories which his Catholic Majesty cedes to the United States by this treaty shall be incorporated in the Union of the United States as soon as may be consistent with the principles of the Federal Constitution, and admitted to the enjoyment of the privileges, rights, and immunities of the citizens of the United States." The private law of the ceded territory was altogether derived from the Spanish government;<sup>2</sup> but here, as in all the colonies of Spain, negroes and Indians were lawfully held in unconditional servitude by the operation of the

<sup>1</sup> VIII. U. S. St. 252. The Territory had been "occupied" by the government of the United States, under the act of 1811 (*ante*, p. 144, note). March 3, 1821, "An act for carrying into execution the treaty," &c. Sec. 2. Provides for the organization of such government as the President may direct; also, for the extension of the U. S. revenue laws, and "the laws relating to the importation of persons of color" to the said Territory. III. Stat. U. S. 637. Another act, March 30, 1822. *An act for the establishment of a territorial government in Florida.* III. Stat. U. S. 654 (and *ibid.*, a note of statutes relating to the government of the Territory); 7 B. & D. 16. Sec. 5. Determines how the legislative power shall be invested, and how far restricted. 12. Declares the importation of slaves from any place without the limits of the United States unlawful; enacts penalties, and that the imported slaves shall receive their freedom. By an amending act, of March 3, 1823, III. St. U. S. 750, sec. 5, provides that the annual laws "be laid before Congress, which, if disapproved of, shall thenceforth be of no force." Sec. 12. Provides for freedom of worship, and the benefit of habeas corpus for the inhabitants. 13. Limits jury qualification to "free, male, white persons." 14. Prohibits the introduction of slaves from abroad. See *Am. Ins. Co. v. Canter*, 1 Peters, 541; *Marshall, Ch. J.*, affirming the power to pass these acts.

<sup>2</sup> *Am. Ins. Co. v. Canter*, 1 Peters, 541. Private property, as it had been held under Spanish law, received protection, independently of any treaty. *United States v. Percheman*, 7 Peters, 51.

same principles which had maintained it in the colonies planted by the English and French.<sup>1</sup>

**1822.**—Among the enactments of the governor and legislative council is *An act for the punishment of slaves for violations of the penal laws of this Territory*. Sec. 1. That for capital offences, slaves shall be tried and punished as whites. 2. Capital offences declared. 3. For other offences, slaves to be tried before a justice of the peace; punishment by whipping, not to exceed sixty lashes. Other provisions included are—4. Outlying runaways to be pursued. 5–8. Against dealing with slaves; against going at large or hiring themselves. 9, 10. Stealing free persons and slave-stealing punished with death. 11, 12. Masters of vessels not to carry out slaves. 13, 14. Makes emancipation lawful under certain conditions. 15. Emancipated negroes traveling about may be committed. 16–19. Provisions relating to title in slaves.

**1825.**—*An act to govern patrols*. Acts in force in 1828, p. 34; Duval's Compil. p. 62. Contains the ordinary provisions. Additional provisions in Laws of 1832, p. 36. A new act in 1833; repealed, 1834; revived, 1836.

**1826**, Dec.—*An act to prevent the future migration of free negroes and mulattoes to this Territory*. Ann. L. p. 81. Enacts that, if such shall not leave the State, they shall be sold for a year at a time. Negroes employed on ships and vessels are excepted. A new law in 1832.

**1827**, Jan. 10.—An act to regulate our citizens trading with Indians. Ib. p. 80. Sec. 3. Carrying away slaves declared punishable with death. —, Jan. 10. *An act to prevent trading with negroes*. Ib. 148. —, Jan. 11. An election law. Sec. 8. Limits the franchise to whites. Ib. p. 89. —, Jan. 21. *An act regulating slaves, and prescribing their punishment in certain cases*, contains the most ordinary provisions of slave Codes. Ib. p. 141.

**1828**, Nov. 14.—*A crimes act*. Ann. L. p. 48. Sec. 10. Declares death penalty for exciting insurrection among slaves

<sup>1</sup> See, in 6 Hall's Law Journal, 285, some extracts from laws of the Spanish Indies relating to slaves; and, ib. 463, a translation of the royal edict or cedula of May 31, 1787, for the good government and protection of slaves in the Spanish colonies, which is the principal enactment on the subject.



(Thompson's Dig. 490). 16. Killing slave in the act of revolt declared justifiable homicide (ib. 491). 108-110. On trading with slaves (ib. 508). 114. Forbids employing slaves in laboring on Sunday (ib. 499), or buying of slaves on that day (ib. 509). A new act in 1832. —. *An act regulating conveyances*. Ib. p. 156. Sec. 6. Declares "slaves shall be deemed, held, and taken as personal property for every purpose whatever" (Thompson's Dig. 183). —. *An act relating to crimes and misdemeanors committed by slaves, free negroes, and mulattoes*. Ib. 174. Sec. 1. "All persons lawfully held to service for life, and the descendants of the females of them within this Territory, and such persons and their descendants as may hereafter be brought into this Territory pursuant to law, being held to service for life, or a given time, by the laws of the State or Territory from whence they were removed, and no other person or persons whatsoever, shall henceforth be deemed slaves." 2-6. Regulate the importation of slaves, forbidding the introduction of those elsewhere convicted of crime. The remaining sections, 7-64, are re-enactments of the older laws, with other provisions similar to those of Georgia. Thompson's Digest of 1847, p. 531.

1829, Nov. 6.—*An act providing for the adoption of the common and statute laws of England, and for repealing certain laws and ordinances*. Sec. 1. Adopts the common law and statute laws of England, which are of a general nature, prior to the 4th July, 1776, so far as not inconsistent with the laws and Constitution of the United States and the laws of the Territory (Thompson's Dig. 21). 2. Repeals all laws and ordinances in force in this Territory previous to July 22, 1822.<sup>1</sup> —, Nov. 17. Amending law of 1828, on trading with and stealing slaves. An. L. p. 133. —, Nov. 31. *An act to prevent the manumission of slaves in certain cases*. Ib. p. 134. Slaves not to be manumitted, under penalty, until security is given for their transportation beyond the Territory. Thompson's Dig. 533.

<sup>1</sup> From an act of 1824, Dec. 23, securing the rights of husband and wife, as determined by the law of Spain, it appears that doubts had arisen as to the effect and operation of the common law of England, as introduced when Florida was in the possession of Great Britain. See acts in force in 1828, p. 23.

**1832**, Jan. 23.—*An act concerning marriages, &c.* Declares it unlawful for any white to intermarry or live in a state of adultery or fornication with any negro, mulatto, quadroon, or other colored person. Thompson's Dig. 511. —. *An act to provide for the collection of judgments against free negroes, &c.* Ann. L. p. 32. Enacts that they shall be sold as servants for time. Repealed Jan. 21, 1834, Ann. L. p. 35, but revived by act of Feb. 4, 1835. Thompson's Dig. 545. —. *A new crimes act.* Ann. L. p. 63. Sec. 1. Adopts the common law of England, except as to the "modes and degree of punishment" (Thompson's Dig. 489); contains the former penal enactments as to slaves and free negroes. (Additional on trading, Laws of 1833, p. 34.) Thompson's Dig. 507-511. —. *An act to prevent the future migration of free negroes into, &c.* Ann. L. p. 143. Forbids such immigration; requires bonds from masters of vessels having negroes on board, and provides for the sheriffs taking into custody such on coming. Thompson's Dig. 534. (This was declared again in 1855, c. 718 of State Laws.) A similar law as to Key West in 1846, c. 104. Thompson's Digest, 536.

**1836**.—*An act respecting the hostile negroes and mulattoes in the Seminole nation.* Ann. Laws, p. 13. Provides for the sale of such, when captured, as prizes, &c., and for the outlawry of whites and blacks found in arms with the Indians. Repealed by act, Jan. 14, 1837. (For the foregoing laws see Duval's Compilation, ed. 1840.)

**1840**, c. 20. Amending the slave Code, prohibits the use of fire-arms by negroes, &c., unless armed by the master for defence against Indians, &c. Thompson's Dig. 509.

**1842**, c. 32. A new and more stringent act to prevent the immigration of free negroes, &c. Requires resident free negroes to have a guardian; imposes a capitation tax, with liability to be sold for time on non-payment. Free negroes coming since 1832 to be sent away, and, if they return, to be sold for ninety-nine years. If masters of vessels allow negroes from

<sup>1</sup> Feb. 9, 1835. An act, No. 34, authorizing the Governor to deliver up fugitives from justice. Duval's Dig. 165; Thompson's Dig. 527.



them to go on shore, the negroes shall be imprisoned, and the vessel bound for the fees.

**1843**, c. 53. An act repealing the last above, and reviving the former acts. —, c. 12. Forbidding, under penalty, the sale of poisonous drugs to negroes, &c. Thompson's Dig. 510.

**1845**.—Constitution of the State.<sup>1</sup> Art. I. sec. 1. Declares that "all freemen, when they form a social compact, are equal, and have certain inherent and indefeasible rights," &c. By Art. VI. sec. 1, the elective franchise is given to whites only.

**1846-7**, c. 75, and 1848-9, c. 257. On trading with slaves. —, c. 87. A new patrol law. Thompson's Dig. 173.

**1847-8**, c. 155. An act requiring free negroes to have a guardian appointed by the judge of probate. Amending are 1856, c. 794, and c. 795, which forbid trading with such, without guardian's consent. —, c. 139. Amending the criminal Code, declares punishment of negro by whipping, and, if free, to pay expenses of prosecution or be sold.

**1848-9**, c. 256. *An act for the protection of slaves*, in two sections. Sec. 1. Makes owners liable to fine, not less than fifty nor more than five hundred dollars, on conviction of neglecting to "feed, clothe, and provide" for their slaves. 2. Makes them liable to a fine, not less than one hundred nor more than one thousand dollars, for failing to furnish their slaves "with sufficient food or raiment."

**1850**, c. 386, c. 387, c. 388; 1855, c. 620, c. 621, are amending acts on trading with slaves, kidnapping slaves, and enticing away slaves, and requiring some white person to be always on each plantation. 1856, c. 790. Against slaves hiring their time.

<sup>1</sup> Act of Congress for the admission of the States of Iowa and Florida into the Union, March 3, 1845; *ante*, p. 177, n. The State Constitution was framed by a convention assembled under an act of the territorial Legislature. It was declared, in the Preamble, to be "in the name of the people of Florida, having and claiming the right of admission into the Union as one of the United States of America, consistent with the principles of the Federal Constitution, and by virtue of the treaty of amity, settlement, and limits between the United States of America and the King of Spain, ceding the provinces of East and West Florida to the United States." It provided, in art. 16, sec. 1, 2, "The General Assembly shall have no power to pass laws for the emancipation of slaves, or to prohibit the introduction of slaves by immigrant owners. Sec. 6. The Legislature shall "declare by law what parts of the common law and what parts of the civil law, not inconsistent with this Constitution, shall be in force in this State."



1854-5, c. 654. *An act to prevent white persons from gaming with negroes or other persons of color.* —, c. 635. *An act to prevent the abduction and escape of slaves from this State.* Relates to vessels leaving St. John's River. —, c. 646. *An act explanatory of the several acts in relation to the migration of negroes and free persons of color into Key West.* Vessels coming in distress, with negroes on board, they shall not be arrested if they stay on board, but the masters of the vessels liable for costs and fines.

1856, c. 690. *An act to prevent slaves from hiring their own time.*

1858-9, c. 860. *An act to permit free persons of African descent to select their own masters and become slaves.* Permits such selection by negroes over fourteen years. Women, or "females," as they are called in the act, may select for their children under fourteen. Idle and dissolute negroes may be sold.<sup>1</sup>

#### § 575. LEGISLATION OF THE STATE OF TEXAS.

In the territory within the present State of Texas, the personal conditions recognized elsewhere in parts of the continent under the dominion of Spain continued to exist while the country was included in the Mexican Republic, until slavery was abolished, by a decree of the Dictator, Guerrero, July 29, 1829. The Constitution of Coahuila and Texas, of 1827, article 13, had declared that, from its promulgation, no one should be born a slave in that State, and that after six months the introduction of slaves should not be permitted.<sup>2</sup> 1 Yoakum's

<sup>1</sup> *Clark v. Gautier* (1859), 8 Florida, 360:—The writ of habeas corpus is not the proper method of trying the right of a negro to freedom. The doctrine of the court is, that the person claiming him cannot be deprived of his *property* without jury trial. The court refer to the *Opinions* in *Dred Scott's* case, "to show that whatever rights the negro or his descendants, if free, may have, are accorded to him, not by right, but by permission and grant of the State in which he is. People from other parts of the globe, through the comity of nations, have a recognized position, by the common voice of the civilized world, which Africans have not. Condemned to servitude, subjected indeed to the dominion of other people from time immemorial, they have been, as they yet continue to be, chattels, subjects of trade and commerce," &c.

A convention, in the name of the State, passed, Jan. 11, 1861, *An ordinance of secession*, similar to that of Alabama and other southern States already mentioned.

<sup>2</sup> *Robbins v. Walters*, 2 Texas, 135.

Hist. of Texas, 252, 264, 269. Peonage, however, was not abolished. According to the same author, it rests mainly on two decrees of the Mexican government,—Nos. 67 and 86, of Sept. 30, 1828, and Apr. 4, 1829; see 1 Yoakum, 262, where the nature of that servile condition is described.

The Republic of Texas declared its independence March 2, 1836. In the Constitution, adopted March 17, 1836, it is declared that "all free, white persons, immigrating," &c., may become citizens; the elective franchise and capacity for office are attributed to "citizens" generally. In the declaration of rights, it is declared that "all men, when they form a social compact, have equal rights," &c. In other places, rights are attributed to all *citizens*.

Under *General Provisions*, it is declared, sec. 9, "All persons of color who were slaves for life previous to their immigration to Texas, and who are now held in bondage, shall remain in the like state of servitude, *provided* the said slaves shall be the bona-fide property of the person so holding said slave as aforesaid. Congress shall pass no laws to prohibit emigrants from bringing their slaves into the republic with them, and holding them by the same tenure by which slaves were held in the United States, nor shall Congress have power to emancipate slaves, nor shall any slaveholder be allowed to emancipate his or her slave or slaves without the consent of Congress, unless he or she shall send his or her slave or slaves without the limits of this republic. No free person of African descent, either in whole or in part, shall be permitted to reside permanently in the republic without the consent of Congress; and the importation or admission of Africans or negroes into this republic, excepting from the United States of America, is forever prohibited, and declared to be piracy." Sec. 10. "All persons (Africans, the descend-

<sup>1</sup> In *Guess v. Lubbock*, 5 Texas, 535, held, that whatever may have been the legal effect of the legislation of Mexico, previous to the Revolution, upon the relation of master and slave in Texas, which relation never ceased for a moment to exist *de facto*, if not *de jure*, there is no doubt the object and effect of this section was to recognize and continue that relation wherever it existed *de facto* in good faith. In *McMullen v. Hodge*, ib. 34, it is held that, a convention of the people has power to take away individual rights, though the exercise of that power is never to be presumed.



ants of Africans, and Indians excepted) who were residing in Texas on the day of the declaration of independence shall be considered citizens of the republic, and entitled," &c. It also provided, Art. IV. sec. 13, "The Congress shall, as early as practicable, introduce by statute the common law of England, with such modifications as our circumstances in their judgment may require, and in all criminal cases the common law shall be the rule of decision."<sup>1</sup>

**1837.**—An act declares enticing away or stealing slaves punishable with death. 1 T. L. p. 187. —. An act that "All negroes, Indians, and all other persons of mixed blood, descended from negro or Indian ancestors, to the third generation inclusive, though one ancestor of each generation may have been a white person, shall be incapable in law to be witnesses in any case whatsoever, except for and against each other. Ib. p. 205. Repealed as to descendants of Indians by 3 T. L. 51.

— *An act to provide for the punishment of crimes and misdemeanors committed by slaves and free persons of color.* 2 T. L. p. 43. Declares a number of crimes punishable with death; lesser offences punishable at discretion of the court. No grand jury presentment required: informal proceeding by petit jury allowed. Slaves or free persons of color, for abusive language to whites, to be punished with stripes.

**1840.**—*An act concerning free persons of color.* 4 T. L. 149. Forbids their immigration, and provides for selling such as slaves who may remain. (Acts of 1841, 5 T. L. 85, 184, except from this free persons of color residing in Texas when declared independent.) An act of 1857, c. 119, forbids masters of vessels bringing in such persons.

— *An act concerning slaves.* 4 T. L. 171. Sec. 1, 2.

<sup>1</sup> An act of Dec. 20, 1836, sec. 41, declares that "the common law of England, as now practiced and understood, shall, in its application to evidence, be followed," &c. Act of Dec. 21, 1836. That all offences known to the common law of England, not provided for by this act, are punishable as at common law. An act of Jan. 20, 1840. *An act to adopt the common law of England, to repeal certain Mexican laws, and to regulate the marital rights of parties*, seems to adopt the common law generally, where not otherwise provided by positive enactment. But an act to regulate civil suits provides that this shall not apply to rules of pleading, but proceedings in all civil suits shall be, as heretofore, conducted by petition and answer. Dallam's Digest, 56.



Against selling liquors to or buying produce of slaves. 3. Any person who shall cruelly treat or abuse a slave shall be prosecuted and fined. 4. Murder of slave declared felony. 6. Against their using guns (enlarged by 1850, c. 58, and 1856, c. 152).

**1841, 1844.**—Acts for the recovery of runaway slaves.

**1845.**—Constitution of the State, declared by "the people of the Republic of Texas, in accordance with the provisions of the" resolution of Congress.<sup>1</sup> Art. I., the bill of rights, sec. 1, declares "all power is inherent in the people." 2. That "all freemen, when they form a social compact, are equal in rights," &c. In other clauses, "citizens," "every citizen," are spoken of as the subjects of guaranteed rights. There is no attribution of any rights to all men as inalienable. Art. III. sec. 1, 2. "All free, male persons, over the age of twenty-one years (Indians not taxed, Africans and the descendants of Africans excepted), who shall have resided, &c., shall be deemed qualified electors."<sup>2</sup>

<sup>1</sup> Entitled *Joint Resolution for annexing Texas to the United States*. V. Stat. U. S. 797, 10 B. & D. 782. "That Congress doth consent that the territory properly included within and rightfully belonging to the Republic of Texas may be erected into a new State, to be called the State of Texas, with a republican form of government, to be adopted by the people of the said Republic, by deputies in convention assembled, with the consent of the existing government, in order that the same may be admitted as one of the States of this Union."

"That the foregoing consent of Congress is given upon the following conditions, and with the following guarantees, to wit: *First*. Said State to be formed subject to the adjustment by this government of all questions of boundary that may arise with other governments, &c. *Third*. New States, of convenient size, not exceeding four in number, in addition to said State of Texas, and having sufficient population, may hereafter, by the consent of said State, be formed out of the territory thereof, which shall be entitled to admission under the provisions of the Federal Constitution. And such States as may be formed out of that portion of said territory lying south of thirty-six degrees thirty minutes north latitude, commonly known as the Missouri Compromise line, shall be admitted into the Union with or without slavery, as each State asking admission may desire; and in such State or States as shall be formed out of said territory north of the said Missouri Compromise line, slavery or involuntary servitude (except for crime) shall be prohibited. Sec. 3. The President may negotiate with Texas for admission, and Texas is to be admitted as soon as Texas and the United States agree upon the terms and the cession of the remaining Texan territory to the United States."

Dec. 29, 1845.—Joint resolution for the admission of the State of Texas into the Union. IX. Stat. U. S. 108. The act of Congress of Sept. 9, 1850, one of the compromise measures (*ante*, Vol. I. p. 563), determines the northern and western boundary of Texas. IX. Stat. U. S. 446.

<sup>2</sup> The eighth article, titled *Slaves*, in terms similar to the sixth article in the Constitutions of Mississippi and Alabama (*ante*, pp. 145, 150), but "they may pass laws to prevent slaves from being brought into this State as merchandise only."

**1846.**—*An act to prevent slaves from hiring their own time, or their owners from hiring them to other slaves, free negroes, or mulattoes.* Sess. L. p. 195.

**1852.**—*An act to indemnify the owners for the loss of slaves executed for capital offences.* Annual Laws, p. 33.

**1857.**—A penal Code: repealing the older acts, contains their several provisions. Art. 386, penalty by imprisonment for a white marrying "a negro, or the descendant of a negro," or cohabiting, if married out of the State. Arts. 564, 566, under *justifiable homicide*, define cases when homicide of slave is justifiable; what shall be deemed insurrection, &c. Title XIX. *Of offences affecting slaves and slave property*, contains articles 650–678, classed under Chapters 1. *Exciting insurrection or insubordination.* 2. *Illegal transportation of slaves.* 3. *Stealing or enticing a slave.* 4. *Offences respecting runaway slaves.* 5. *Importing slaves guilty of crime.* 6. *Harboring and concealing.* 7. *Trading with slaves.* 8. *Cruel treatment of slaves.*

In the same Code, Part III. *Of offences committed by slaves and free persons of color.* Title I. *General Provisions*, as to rules of trial and punishment. Title II. *Rules applicable to offences against the person, when committed by slaves or free persons of color.* (In these, a number of "general principles," descriptive of the relation between the different races, and of the status of the colored, which are of great interest, as they may be taken to be applicable as common law in most of the slaveholding States.) Title III. *Of the punishment of slaves and free persons of color.*

In the Code of criminal procedure, Part IV. Title VII., is, *Of proceedings before justices of the peace and mayors against slaves who hire their time, or are hired to other slaves or to free persons of color.* See Texas Codes, ed. 1857; Oldham and White's Digest of the laws of Texas, ed. 1859.

**1857–8**, c. 63. *An act to permit free persons of African descent to select their own master and become slaves.* Dig. p. 225. Negroes above fourteen years, and children on petition of the mother, on a hearing before the court, may be decreed the slaves of a selected master. —, c. 133. *An act to en-*



*courage the reclamation of slaves escaping beyond the limits of the slave territories of the United States.*<sup>1</sup> Provides for payment by the State, in the first instance, of one third of the value, as a reward to any person recapturing such slaves.

§ 576. LEGISLATION OF THE STATE OF CALIFORNIA.

In the territory of the present State of California Mexican citizens were living under the civil law of Mexico at the time of its occupation by Americans, under the authority of the government of the United States, in 1846. Yet it does not appear that that law has, at any time thereafter, been recognized as having had that territorial extent which would have required its continuance as the law of the land until abrogated by the new sovereign.<sup>2</sup> The Mexican law operated as a personal law in determining the individual rights of Mexicans,<sup>3</sup> and was necessarily referred to as evidence of fact in the determination of the existing land titles.<sup>4</sup>

It may be doubted, therefore, whether the Mexican law prohibiting slavery<sup>5</sup> could, by continuing as the local law, have

<sup>1</sup> Bartley's Digest, published 1850, does not contain any law authorizing the governor to deliver fugitives from justice. Oldham and White's Dig. of 1859, gives, in arts. 878-890, a law as of Aug. 26, 1856 (not found in annual laws), which contemplates the delivery of fugitives from justice without granting any special power to the governor.

<sup>2</sup> *Ante*, Vol. I. p. 115.

<sup>3</sup> Treaty of Guadalupe Hidalgo, Feb. 2, 1848, IX. Stat. U. S. 108. Art. 8. Provides that Mexicans then established in the Territories previously belonging to Mexico shall have the choice of remaining or removing with their property, &c. "Those who shall prefer to remain in said Territories may either retain the title and rights of Mexican citizens, or acquire those of citizens of the United States." They were to make election within one year. Art. 9. "Mexicans who, in the Territories aforesaid, shall not preserve the character of citizens of the Mexican Republic, conformably to what is stipulated in the preceding article, shall be incorporated into the Union of the United States, and be admitted at the proper time (to be judged of by the Congress of the United States) to the enjoyment of all the rights of citizens of the United States, according to the principles of the Constitution; and in the meantime shall be maintained and protected in the free enjoyment of their liberty and property, and secured in the free exercise of their religion without restriction." There is no distinction of persons with respect to color or race.

<sup>4</sup> See pp. 576, 577, 600, in Vol. I. California Rep. Appendix.

<sup>5</sup> In the matter of Perkins (1852), 2 Cal. 424, where the question was of the validity of the State law of 1852, it was held, that slaves brought from Mississippi to California were lawfully held as such. The opinions delivered by Judges Murray and Anderson are remarkable for containing the same doctrines, or doctrines very similar to those which, as held by the Supreme Court of the United States,



presented such an universal attribution of liberty as should have prevented the judicial recognition of the relation of master

have made Dred Scott's case so important. Judge Murray says, *ib.* 439:—"Again it is said, that slavery is a municipal regulation, founded on and limited to the range of the territorial laws; that slavery was prohibited by a decree of the Mexican Congress, and did not exist at the time of the acquisition of California; that the laws and municipal regulations of Mexico remained in force until changed by the new sovereignty; and, consequently, slavery was expressly prohibited by virtue of the laws of Mexico up to the time of the adoption of our State Constitution. I shall not attempt to dispute the correctness of some of these propositions, though I cannot admit the conclusion drawn from thence by the learned counsel. Slavery may be admitted by custom, and is said to have been introduced in all modern States, except some of the colonies of Spain, without any act of legislative recognition; but there must be some positive municipal law to entitle the master to assert a right to, and exercise acts of ownership over, the person of the slave; so that the master may possess a property in his slave by custom, and still be unable to control him for want of some positive law regulating this species of property. [Compare *ante*, § 528.] Although slavery may, as between separate States, be considered the creature of municipal regulations, still the Constitution of the United States recognizes a property in this class of persons, and the institution of slavery is a social and political one. While I am willing to admit for present purposes (although I have heretofore denied the application of these laws to property and contracts made by Americans after the acquisition of this country) that the laws of Mexico remained in force until changed by the act of our Legislature, I do so because I regard slavery as a political institution; and the rule is well settled, that the political laws of the ceded or conquered country give way to the acquiring country."

Judge Anderson's argument is based mainly on the doctrine that slaves are property, which, as recognized by the Constitution of the United States, must be taken to be supported by a law of national extent—the same doctrine afterwards asserted by Chief Justice Taney. Judge Anderson repeatedly asserts, as the doctrine of older cases, that wherever the relation between master and slave has been internationally recognized, the slave is recognized as property. *Ib.* 447. "The slave is 'property,' and so to be judicially regarded." *Ib.* 453. "Slaves are recognized by the Constitution of the United States as property, and protected." In the same place he refers to their being counted in the federal basis of representation and taxation as making slavery a political institution: which also seems to be the foundation of Judge Murray's opinion. And *ib.* 454. "So the right of every citizen of the United States to emigrate to this Territory, and bring his property with him, was perfect, equal, and sacred. The property here brought in question is that of slaves. The Constitution of the United States was in full force here. Slaves were as much recognized by that as property as any other objects whatever. There were no laws restraining the emigration of slaves. California had ceased to be Mexican territory, and was under the political institutions of the United States, whose government alone had the power to give executory effect to any law which should act upon American emigrants. It did disregard the Mexican law of emancipation, as it had a perfect right to do; and was so constitutionally bound, because to have given it effect would have been to nullify a political immunity secured to the people of the slave States by the original basis of compromise to which all had agreed. The Mexican law was repelled by the political nature of the institution of slavery, and therefore became obsolete. California, even as a sovereign State, cannot by law declare the slaves who were here at the time of its adoption into the Union free, except as a forfeiture, under the penal sanction of an act which might require their removal within a reasonable time after capture. *A fortiori*, that which a sovereign State could not do, a territorial government could not, if it had so attempted. It is not sovereign.

"When the United States acquired the territory of California, it became the common property of all the people of all the States, and the right of emigration

and slave, when coming from some State in which they had been in that relation. It may be argued, on the principles hereinbefore set forth, that slavery, by the so-called comity of nations, would have become a legal condition in California, even when the master and slave should have acquired a domicile.<sup>1</sup> The doctrine set forth in Judge Taney's opinion, in *Dred Scott's* case, might however require the conclusion that slavery would have become lawful in any portion of Mexican territory which might have been acquired by the United States. The practical application of such doctrine had before that case been shown in the decision of the Supreme Court of California, in 1852; and in that view the extracts given below from the opinions will appear important.

**1849.**—Constitution of the State.<sup>2</sup> Art. I. A bill of rights. Sec. 1. "All men are by nature free and independent, and have certain inalienable rights," &c. 18. "Neither slavery nor involuntary servitude, unless for the punishment of crimes, shall ever be tolerated in this State." Art. II. sec. 1, limits the suffrage to whites.

**1850,** c. 95. An act declaring "the common law of England, so far as it is not repugnant to or inconsistent with the Constitution of the United States, or the Constitution or laws of the State of California, shall be the rule of decision in the courts of this State." —, c. 99. *An act concerning crimes and punishments.* Sec. 53. "Kidnapping is the forcible abduction or stealing away of a man, woman, or child, from his or her own country, and sending or taking him or her into another." 54. "Every person who shall forcibly steal, take, or arrest any man, woman, or child, whether white, black, or colored, or any Indian in this State, and carry him or her into another county, State, or Territory, or who shall forcibly take or arrest any person or persons whatsoever, with a design to

with every species of property belonging to the citizens was inherent with its use and possession. By the 5th art. of the amendments to the Constitution [of the U. S.] it is provided 'that no person shall,' &c. The judge argues that this clause of the Constitution of the United States maintains the right of the master in this case, even against the power of the State.

<sup>1</sup> See *ante*, p. 184, the argument in respect to Kansas and Nebraska.

<sup>2</sup> 1850, Sept. 9. *An act for the admission of the State of California into the Union*, IX. St. U. S. 452, one of the "Compromise measures." *Ante*, Vol. I. p. 563.



take him or her out of this State, without having established a claim according to the laws of the United States, shall, upon conviction, be deemed guilty of kidnapping, and be punished by imprisonment in the State prison for any term not less than one nor more than ten years for each person kidnapped or attempted to be kidnapped." 55. "Every person who shall hire, persuade, entice, decoy, or reduce by false promises, misrepresentations, and the like, any negro, mulatto, or colored person, to go out of this State, or to be taken or removed therefrom, for the purpose and with the intent to sell such negro, mulatto, or colored person into slavery or involuntary servitude, or otherwise to employ him or her for his or for her own use, or to the use of another, without the free will and consent of such negro, mulatto, or colored person, shall be deemed to have committed the crime of kidnapping, and, upon conviction thereof, shall be punished as in the next preceding section specified." Compiled Laws, c. 125. —, c. 133. *An act for the government and protection of Indians.* Comp. L. c. 150. Contains provisions respecting Indian children held as apprentices, and contracts of service by adult Indians. —, c. 140. Regulating marriages. Comp. L. c. 35. Sec. 3. "All marriages of white persons with negroes or mulattoes are declared illegal and void."

**1852.**—*An act respecting fugitives from labor, and slaves brought to this State prior to her admission into the Union.*<sup>1</sup> Comp. L. c. 65. Sec. 1. The fugitive held to service by the law of another State may be sued by the claimant, or the latter may have a warrant, and, when seized, shall be brought "before any judge or justice of this State, or before any magistrate of a county, city, or town corporate, and upon proof to the satisfaction of such judge or magistrate, either by oral testimony or affidavit," that the fugitive owes the service, the magistrate shall give a certificate, which shall be a warrant to

<sup>1</sup> In the matter of Perkins, 2 Cal. 424, this statute is held not contrary to anything in the Constitution of the United States; it is regarded as within the police power of the State, and the doctrine of Prigg's case is not disputed. It is further held not to be inconsistent with the State Bill of Rights. Judge Anderson, *ib.* p. 455, expressly says, that the 18th section of the first article of the Constitution does not emancipate slaves brought into the State, and that the owner has the right to take them away as slaves.



the claimant to remove; the testimony of the alleged fugitive shall not be admitted; and the certificate shall be conclusive. 2. Penalties for obstructing a claimant in the recovery of his property. 3. Duties of officers, and penalties for neglect. 4. (An amend. inserted from a stat. of 1853.) A person brought into this State, from another wherein held to service, before the admission of this State into the Union, to be deemed a fugitive. (By an amendment of 1854, c. 22, the continuance of this is limited to the 15th April, 1855.) 5. Claimants not allowed to hold slaves in servitude in this State.

1854,<sup>1</sup> c. 54. An act amending the Code of practice. Sec. 42, 3d. "Indians, or persons having one half or more of Indian blood, and negroes, or persons having one half or more of negro blood," shall not be witnesses in a case to which a white is a party.

#### § 577. LEGISLATION OF THE TERRITORY OF NEW MEXICO.

It cannot be disputed that the law of the Mexican republic had, in New Mexico, when the country was acquired by the United States, that territorial extent which would cause its continuance, as the local law, to determine all rights and obligations of private persons, until changed by competent legislative authority.

Under the decrees of the former sovereign, which had declared free all who in that country had been held as slaves, it should probably have been held that the law of New Mexico had not merely changed the condition of those then held there in slavery, but had attributed the right of personal liberty universally, that is, to all natural persons, so far as they might be within the jurisdiction, and thereby prevented the recognition of slavery as the condition of any person thereafter introduced into the country from some other jurisdiction.

If this had been the effect of the law of New Mexico, it may be urged that this law, continuing to exist as the local law of the Territory after the acquisition of the country by the United States, would prevent the judicial recognition of the right of the

<sup>1</sup> An act of 1851. *An act to regulate proceedings in criminal cases.* Compiled Laws, ch. 121, § 665, authorizes the governor to deliver up fugitives from justice on demand.

master and the obligations of the slave in the case of persons immigrating from any part of the United States.

But although the former private law of the Territory continues in force after the change of dominion, yet it can thenceforth derive its authority only from the juridical will of the new possessor of sovereign legislative power.

If the law of New Mexico had prohibited the recognition of slavery, in the case of persons introduced from other jurisdictions, only by indicating that the possessor of legislative power attributed liberty to all natural persons, it may be questioned whether the new possessor of that power in the same jurisdiction can be taken to attribute personal liberty in like manner, universally, if it can be shown that elsewhere, by other manifestations of juridical will, this new possessor of that power has maintained conditions inconsistent with the possession of personal liberty.

At this point in the inquiry it becomes necessary to discriminate the political person or persons from whom, as the present possessors of this power, such an attribution of personal liberty to all persons within this territory may proceed.

This person or persons must either be a political people of the Territory, having political power within that Territory exclusively, or the United States—the people of the United States—those from whom the Constitution of the United States derives its authority.<sup>1</sup>

If the political people of the Territory are the possessors of this power, or if they are the source of the law which determines the status of persons domiciled within the Territory, it would appear that, until they should have legislated on the subject, the Mexican law of personal condition must be taken as the only exponent of their juridical will; that whenever a slave is brought into the Territory, or at least when brought to reside, the attribution of liberty to all under that law must, as the continuing act of this political people, prevent the judicial recognition of the right of the master and the obligation of the slave which had existed in a relation under the law of some slaveholding jurisdiction.

<sup>1</sup> See *Ante*, §§ 376, 397.



But if the United States—the people of the United States—those from whom the Constitution of the United States derives its authority—are the source from which the law proceeds which determines personal status in the Territory, it may be said that, as they have in other places likewise under their exclusive jurisdiction maintained the status of slavery, and, in certain circumstances, maintain even in non-slaveholding States the right of the master and the obligation of the bondman, they cannot be taken to ascribe liberty to all natural persons; that hence, admitting the continuance of Mexican law to determine the rights of persons living within the Territory before its acquisition by the United States, slavery may, on the principle misnamed the principle of comity, be judicially recognized in the case of persons brought from places where they had been held in involuntary servitude.<sup>1</sup>

But so far as any law resting on the authority of the United States maintains the condition of persons as bond or free, it operates either as *quasi*-international law, upon persons whose condition is actually determined by the internal law of some State or several jurisdiction of the United States, or as the internal law of jurisdictions which, as such, are entirely distinct, though under the same sovereign. There is no law determining the status of persons in the place of their domicile, which at once rests on national authority, and has national extent.<sup>2</sup>

It may be urged that, whenever the juridical will of the United States, in reference to the attribution or denial of personal liberty, is promulgated within any jurisdiction, it is declared exclusively with reference to the particular jurisdiction, as the law of each State is promulgated only with reference to the limits of the State; that liberty may be attributed universally in one jurisdiction and not in another, although both be under one sovereign source of law; that the law resting on the authority of the United States in New Mexico may be identical with that which, in that place, formerly rested on the authority of Mexico, and may attribute liberty to all persons

<sup>1</sup> *Ante*, p. 184.

<sup>2</sup> *Ante*, Vol. I. pp. 453-456.



therein, although the law of other places, resting on the same authority, may recognize slavery.

This view seems to be supported by what is commonly received as to the law of other places under the exclusive jurisdiction of the United States. In forts, arsenals, &c., ceded by States to the United States, the law of the ceding State determining the status of persons has continued to operate. It seems to be admitted that in the places ceded by the non-slaveholding States slaves cannot be brought from the slave States and there retained in slavery.<sup>1</sup> This must be because the former law attributing liberty to all still operates, notwithstanding the change of sovereignty, for their enfranchisement.

It would appear that a similar theory must have obtained in the jurisprudence of European countries in whose colonies slavery was a lawful condition, while its recognition in those countries was prevented by the law which there ascribed liberty to all as a natural or inherent right; for, in the jurisprudence of these countries, the law of the mother country, declaring all free, and the law of the colony, sanctioning slavery were supposed to emanate from the same political source.<sup>2</sup>

The inquiry has thus far been conducted upon the supposition that the law of Mexico had simply declared free those who were then held in slavery in Mexico. But if the Mexican law contained an express prohibition of the introduction of slaves from other jurisdictions, or declared free all who should be brought into the country, it would seem that this direct prohibition of slavery would, as the continuing law under the new sovereignty, exclude slaves from other parts of the United States, until abrogated by special legislative enactment.

If the right of immigrating slave-owners, or their property in respect to slaves, is protected against all legislative action, whether of Congress or of the local sovereignty, either by the Constitution of the United States operating as a bill of

<sup>1</sup> This at least is the opinion commonly received in the non-slaveholding States. There may be those who would claim legal protection for slavery in every place under the exclusive jurisdiction of the United States government; either on the international principles above stated, or on the doctrine that slaves are property, protected as such by the Constitution, without regard to the extent of some State law to maintain it.

<sup>2</sup> Compare the argument *ante*, Vol. I. pp. 374-376.

rights, or by the doctrine of the equality of the States in respect to the territory of the United States, then, of course, the same principle would prevent the effect here ascribed to the continuing law of Mexico.

**1851.**—*An act declaring and establishing the right of the people of New Mexico*, enacted by the first local Legislature established by Congress.<sup>1</sup> Sess. L. 1st and 2d Sess. p. 152. This seems intended for a declaration of public and constitutional law, and by claiming, apparently, for the people of the Territory an inherent political sovereignty, its consistency with the organic law declared by Congress might be questioned. Art. I. Declares that "All political power is inherent in the people, and all free governments are founded on their authority, and instituted for their benefit, and they have at all times the unalienable right to alter, reform, or abolish the form of government in such manner as they may think expedient." Art. II. "All freemen, when they form a social compact, have equal rights," &c.<sup>2</sup>

<sup>1</sup> By act of Sept. 9, 1850, classed with the *Compromise* measures of that date. *An act proposing to the State of Texas the establishment of her northern and western boundaries, the relinquishment by the said State of all territory claimed by her exterior to said boundaries and of all her claims upon the United States, and to establish a territorial government for New Mexico.* IX. St. U. S. 446. (*Ante*, p. 198.) Sec. 1 declares the proposed boundaries. A proviso is added, that the act shall not "inhibit the government of the United States from dividing said Territory into two or more Territories, in such manner and at such times as Congress shall deem convenient and proper, or from attaching any portion thereof to any other Territory or State; and *provided, further*, that, when admitted as a State, the said Territory or any portion of the same shall be received into the Union with or without slavery, as their Constitution may prescribe at the time of their admission." Sec. 2-7. Vest the executive and legislative power. 6. Limits the franchise to whites. 7. "The legislative power of the Territory shall extend to all rightful subjects of legislation consistent with the Constitution of the United States and the provisions of this act." "All laws passed by the legislative assembly and governor shall be submitted to the Congress of the United States, and, if disapproved, shall be null and of no effect." 10. Vesting the judicial power—provides that "in all cases involving title to slaves the said writs of error or appeals shall be allowed and decided by the said Supreme Court [it being before provided that writs of error from the Supreme Court of the Territory shall lie to the Supreme Court of the United States], without regard to the value of the matter, property, or title in question;" and also that writ of error shall be allowed to said Supreme Court on any writ of habeas corpus involving the question of personal freedom. By sec. 17 the Constitution and laws of the United States are extended over New Mexico. By sec. 19, "no citizen of the United States shall be deprived of his life, liberty, or property in said Territory, except by the judgment of his peers and the law of the land."

<sup>2</sup> In the same edition of laws, p. 32, is printed the Declaration of Rights which



— *A law regulating contracts between masters and servants.* Ibid. p. 183. Sec. 1. Contracts between master and servant to be enforced. 2. Contracts to be voluntary on both sides. 3. Supplies to servants to be furnished at market rates. 4. Children, in what cases and how, bound out. 5. Servant cannot quit his master when in master's debt. 18. Master may make advances on account of monthly salary. 6. Family of deceased person serving are not held to pay any balance due from him, if he has no effects. 7. When liable for damages to each other. 8. Hours of service and labor regulated. 9, 14. Punishment of servants by the authorities. 10. Accounts between them to be authenticated by alcades, &c. 11. Questions between them to be decided by the judicial authority. 12. Proceeding to recover person of runaway servants allowed. 13. Servant's debt to the master has priority over his obligations to others. 14. Masters may be tried and punished for chastising or forcing servants to serve beyond time. 16. That "all free *white* men and women, not embarrassed by law or other reasonable causes preventing the fulfillment thereof, may celebrate this species of contract."

1859,<sup>2</sup> Jan. *An act amendatory of the law relative to contracts between masters and servants* is reported to have been enacted by the territorial Legislature, providing, in sec. 1, that runaway servants shall be "considered as fugitives from justice;" that they shall be arrested and put to work by the magistrates, and their masters notified. 2. Declares servants under contract, engaged "on trips as shepherds," who may abandon the master or property, shall be responsible for losses,

was prefixed to a Code published by General Kearney, Sept. 22, 1846, on the occupation of the country by the army of the United States, the first article of which declares that "all political power is vested in and belongs to the people." It may have been intended in the assertion of these propositions to intimate that the Territory was not included in the dominion of the United States by conquest, but by a spontaneous annexation.

<sup>1</sup> The original of the act is the Spanish version, in which the word is *libres—free*. No words descriptive of color are employed in that version. This act seems to be substantially a re-enactment of the Mexican decrees by which peonage was regulated. Compare the abstract of those decrees in 1 Yoakum's History of Texas, 262, 263.

<sup>2</sup> An act of 1855-6, c. 27:—Authorizes the governor to surrender fugitives from justice on demand.



&c. 4. "No court of this Territory shall have jurisdiction nor take cognizance of any cause for the correction that masters may give their servants for neglect of their duties as servants, for they are considered as domestic servants to their masters, and they should correct their neglect and faults; for as soldiers are punished by their chiefs, without the intervention of the civil authority, by reason of the salary they enjoy, an equal right should be granted to those persons who pay their money to be served in the protection of their property. Provided, that such correction shall not be inflicted in a cruel manner, with clubs or stripes."

— Another act is reported to have been enacted, entitled *An act to provide for the protection of property in slaves*, containing, in thirty sections, the principal enactments, for the maintenance of the rights of the owner and the protection of the community, which are found in the Codes of the slaveholding States. There is, however, no clause declaring who shall be slaves, or that slavery or any kind of servitude shall be lawful. Sec. 1. Declares the unlawful killing of a slave or other offence on his person punishable as in case of a free white. 2-5. Against stealing slaves and aiding them to escape, forging passes, &c. 6. Against exciting insurrection, &c. 7. Against furnishing arms. 8. Against trading with slaves. 9. Against gaming with slaves. 10-15. Proceedings against runaway slaves. 16. Punishment of owner for not properly providing for slave. 17. Trial of slave for felony. 18. Punishment of owner for cruel treatment. 19. Against allowing slaves to go at large, &c. 20. Punishment of disorderly, insolent slaves. 21. Punishment for misdemeanor, by branding or stripes. 22. "No slave, free negro, or mulatto, shall be permitted to give evidence in any court against a free white person, but against each other they shall be competent witnesses." 23. Marriages between white persons and slaves, or free negroes and mulattoes, declared void, and the white party declared punishable. 24. Negro, &c., for rape, or the attempt to commit, shall suffer death. 25. "The emancipation of slaves within this Territory is totally prohibited." 26. Against slaves leaving the master's premises at night. 27. Proceedings in claim for pos-

session of slaves. 28. Fine for holding as slave any negro, &c., entitled to freedom. 29, 30. Explanatory of the act.<sup>1</sup>

### § 578. LEGISLATION OF UTAH TERRITORY.

The portion of country included within this Territory had been with the dominion of Mexico.<sup>2</sup> But the laws of Mexico have never been taken to have had territorial extent therein. It may be taken to have been without any local law until permanent settlements were made there by American citizens. Until some system of jurisprudence should have been declared to prevail as the general law of the land, the condition of persons would have been determined by those principles which take effect either as international or as internal private law, as the persons to whom they are applied may be regarded as domiciled or as temporary inhabitants. The reasoning which has herein already been presented as sustaining a condition of involuntary servitude in Nebraska and Kansas Territories<sup>3</sup>

<sup>1</sup> I have not been able to find any authentic publication of these acts of 1859, and know of them only from newspaper reports. *A bill to disapprove and declare null and void all territorial acts or parts of acts heretofore passed by the Legislative Assembly of New Mexico which establish, protect, or legalize involuntary servitude, or slavery, within said Territory, except as a punishment for crime, upon due conviction,* passed the House of Representatives, May 10, 1860.

<sup>2</sup> *Ante*, p. 155, note 2.

<sup>3</sup> *Ante*, pp. 180-185:—To the reasoning which, in the place referred to, has been stated as maintaining slavery in those Territories in which no local law has been previously recognized, the reader may think the objection will apply—that it proves *too much*; that it requires that any right or obligation which has existed under the law of another forum be recognized, even though the relation to which it is incident be immoral, injurious to society, &c. The answer to this is,

*First.* The supposition of the possible existence of such relations is excluded in the argument by that principle which, in the first chapter of this work, is affirmed as an axiomatic rule in the judicial discrimination of unwritten law, viz.: that the judge must recognize the jural character of the law of any civilized community, and, in his function, accept every relation maintained by such law as jural, or rightful, in and for the circumstances in which it is applied (*ante*, § 33), and recognize its continuance, except as it may be limited by the international principle stated in the argument above referred to, not allowing or disallowing it, according to his individual ethical judgment; and further, that if the supposition be admissible, the conclusion must, nevertheless, be accepted, and regarded as an imperfection incident to jurisprudence, as of human origin; which can only be remedied by legislation, which again is liable to imperfection.

*Secondly.* The consequence anticipated does not follow—because, though there be no existing local law which, by the universal attribution of a right or obligation inconsistent with the supposed immoral or injurious relation, would prevent its judicial recognition, yet the judge is bound to recognize a universal jurisprudence, and rights and obligations may, by some of the rules which have this char-



would have been equally applicable to sustain it in this Territory.

It would seem that persons would be bond or free in such Territory, according to their status under the law of the place of their former domicil.

**1849, March 18.** A convention of the inhabitants adopted a Constitution for the *State of Deseret*, to be in force "until the Congress of the United States shall otherwise provide for the government of the Territory hereinafter named and described, by admitting us into the Union," and proceeds to declare it under the form, "We the people." This Constitution of "the State of Deseret" is printed with the acts, &c., of the Assembly of the Territory of Utah,<sup>1</sup> printed, Salt Lake City,

acter, be attributed to all natural persons, so as to prevent the recognition of the rights and obligations incident to the supposed relation. Thus a contract for prostitution, a contract to associate for robbery, &c., if legalized by the law of another forum, would be contrary to this universal jurisprudence as it is known from the juridical action of the United States and of those nations from which their jurisprudence is derived. It is here that Christianity or the rules of Christian ethics may be recognized as law; not because the judge may be one who connects them with a divine inspiration, but because they are to a certain extent (and to that extent only can a court apply them as law) identified with the jurisprudence of the civilized nations of Europe and America, *gentes moratiores* (vol. I. pp. 33, 172). Thus it may be held that, as Christianity defines marriage as a relation of one man and one woman to each other individually and exclusively, the universal jurisprudence of these nations attributes to every man and every woman who has entered into this relation a right and obligation incompatible with polygamy or polyandry; and that, though a cohabitation of one man with more than one woman, or of one woman with more than one man, should be lawful by the law of some one forum, it could not be recognized in another, even though it be a Territory which has not had any local law.

The acrimony by which the discussion of the question of slavery in the Territories is characterized is mainly ascribable to the necessity of inquiring as to the existence of any rule having the character of universal jurisprudence, and the occasion thereby offered to compare the rights and obligations incident to slavery with the requirements of Christian ethics. Those who insist that the law of some particular State or States for personal condition should, in the Territories, be received as universal jurisprudence, are constantly found to derive that law from the "law of nature," or from revelation. This is illustrated by those who affirm that persons held as slaves in one of the States are to be regarded everywhere as property, or, at least, as persons of a race condemned by nature and revelation to perpetual servitude, and, equally so, by those who claim that slavery or slave-owning is a crime by natural law and Christian doctrine; each thereby ascribing the taint of heresy to the other.

<sup>1</sup> Act of Congress 1850, Sept. 9. *An act to establish a territorial government for Utah.* IX. Stat. 453. Sec. 1. Describing boundaries, "and, when admitted as a State, the said Territory or any portion of the same shall be received into the Union with or without slavery, as their Constitution may prescribe at the time of their admission," and declaring power of Congress to divide the Territory at any time. 2-16. Declaring how executive, legislative, and judicial power shall be vested. 5.



1855. Art. V. sec. 10, limits suffrage to whites. VI. sec. 1. Militia service so limited. VIII. A declaration of rights. Sec. 1. "In republican governments all men *should be* born equally free and independent, and possess certain natural," &c. 3. Declares freedom of worship and forbids any State ecclesiastical establishment.<sup>1</sup> There is no reference to slavery or to blacks.

**1852.**—*An act in relation to service.* Laws of 1855, ch. 17. Sec. 1. "That any persons coming into this Territory, and

Limits the elective franchise to whites. 6. "That the legislative power of said Territory shall extend to all rightful subjects of legislation consistent with the Constitution of the United States and the provisions of this act;" contains restrictions as to its affecting the landed property of the United States; and provides that "all the laws passed by the Legislative Assembly and governor shall be submitted to the Congress of the United States, and, if disapproved, shall be null and of no effect." 9. Allowing appeals to the Supreme Court of the United States, and provides for cases of title to slaves and of possession of personal freedom. 17. Extends the Constitution and laws of the United States over the Territory so far as applicable.

By Territorial Laws of 1855, ch. 22, § 17, "All criminal prosecutions shall be commenced and carried on in the name of 'the people of the United States in the Territory of Utah.'"

<sup>1</sup>The territorial Legislature, Oct. 4, 1851, passed a resolution legalizing the ordinances of the provisional government of the State of Deseret, passed between Jan. 15, 1850, and Feb. 12, 1851. These relate principally to the organization of counties and corporations. Among them is *An ordinance incorporating the Church of Jesus Christ of Latter-Day Saints* (Rev. L. of 1855, p. 103). Sec. 1. Incorporates all the inhabitants of the State of Deseret, who are known as the church of the above name, into one body, with unlimited power of holding real and personal estate, and to "establish order and regulate worship." 2. Provides for the election of one trustee and twelve assistant trustees, with power to hold all the property and manage all affairs of this church. Sec. 3 is as follows:—"And be it further ordained, that, as said church holds the constitutional and original right, in common with all civil and religious communities, 'to worship God according to the dictates of conscience;' to reverence communion agreeably to the principles of truth, and to solemnize marriage compatible with the revelations of Jesus Christ; for the security and full enjoyment of all blessings and privileges embodied in the religion of Jesus Christ free to all;—it is also declared, that said church does and shall possess and enjoy continually the power and authority, in and of itself, to originate, make, pass, and establish rules, regulations, ordinances, laws, customs, and criterions for the good order, safety, government, conveniences, comfort, and control of said church, and for the punishment or forgiveness of all offences, relative to fellowship, according to church covenants; that the pursuit of bliss, and the enjoyment of life, in every capacity of public association and domestic happiness, temporal expansion, or spiritual increase upon the earth, may not legally be questioned: provided, however, that each and every act or practice so established, or adopted for law, or custom, shall relate to solemnities, sacraments, ceremonies, consecrations, endowments, tithings, marriages, fellowship, or the religious duties of man to his Maker; inasmuch as the doctrines, principles, practices, or performances support virtue, and increase morality, and are not inconsistent with or repugnant to the Constitution of the United States, or of this State, and are founded in the revelations of the Lord."

bringing with them servants justly bound to them, arising from special contract or otherwise, said person or persons shall be entitled to such service or labor by the laws of this Territory: Provided, that he shall file in the office of the probate court written and satisfactory evidence that such service or labor is due." 2. "That the probate court shall receive as evidence any contract properly attested in writing, or any well-proved agreement, wherein the party or parties serving have received or are to receive a reasonable compensation for his, her, or their services: Provided, that no contract shall bind the heirs of the servant or servants for a longer period than will satisfy the debt due his, her, or their master or masters." 3. "That any person conveying a servant or servants, and his, her, or their children, from any part of the United States or other country, and shall place in the office of the probate court the certificate of any court of record, under seal, properly attested, that he, she, or they are entitled lawfully to the service of such servant or servants, and his, her, or their children, the probate justice shall record the same, and the master or mistress, his, her, or their heirs, shall be entitled to the services of the said servant or servants, unless forfeited as hereinafter provided, if it shall appear that such servant or servants came into the Territory of their own free will and choice." 4. That if any master or mistress have sexual intercourse with their servants "of the African race," their claim shall be forfeited to the Commonwealth; also punished by fine and imprisonment. 5. Duties towards servants; of servants towards masters. 6. Master may punish servants; shall forfeit them when guilty of cruelty or abuse. 7, 8. Transfer of servants to be made only before probate court. 9. Servants to be sent to school.

— *A preamble and an act for the further relief of Indian slaves and prisoners.* Laws of 1855, c. 24. Recites the peculiar situation of the territorial government in Indian Territory; that "the laws of the United States in relation to intercourse with Indians are designed for and only applicable to Territories and countries under the sole and exclusive rule and jurisdiction of the United States;" that "from time immemorial the practice of purchasing Indian women and children, of the Utah tribe of



Indians, by Mexican traders, has been indulged in and carried on by those respective people, until the Indians consider it an allowable traffic, and frequently offer their prisoners or children for sale;" that "it is a common practice among these Indians to gamble away their own children and women;" and that "one family frequently steals the children and women of another family;" recites the sufferings which these endure; that they are sometimes wantonly killed when they cannot be sold; that "when the inhabitants do not purchase or trade for those so offered for sale, they are generally doomed to the most miserable existence;" that, in view of this, it is "the duty of all humane and Christian people to extend to this degraded and down-trodden race such relief as can be accorded," &c., &c.; that, for a remedy "to ameliorate their condition, preserve their lives, and redeem them from a worse than African bondage," Congress should be memorialized to provide, and further should concur in this act, which requires whites having Indian prisoners to go before the probate court, or the selectmen, and have such Indian bound to them for a term not exceeding twenty years; authorizes the selectmen to obtain such prisoners and bind them out. The masters are required to instruct and becomingly clothe such apprentices.<sup>1</sup>

§ 579. LEGISLATION OF THE STATE OF OREGON.

The territory included in the State of Oregon and the Washington Territory had never been recognized by the United States as portion either of Spanish America or of that Louisiana which was acquired from France.<sup>2</sup> It may be taken to have been without any local law when first settled by American citizens.

The earliest act of local legislation appears in three "Articles of Compact among the free citizens of this Territory," dated July 5, 1845. In the first article the civil and social rights of

In ch. 64 of the same collection, sec. 1, what questions of law are to be decided by the court, "and no report, decision, or doings of any court shall be read, argued, cited, or adopted as precedent in any other trial."

<sup>2</sup> Ante, p. 155, note 1. The boundary of the country on the north was settled by treaty with Great Britain, June 15, 1846. IX. St. U. S. 869.



the inhabitants are declared. Sec. 2. Secures habeas corpus and judicial proceedings, according to the course of the common law," &c. It is also declared that the Indians shall not be disturbed "in their property, rights, or liberty, \* \* \* unless in just wars authorized by the representatives of the people." 4. "There shall be neither slavery nor involuntary servitude in said Territory, otherwise than for the punishment of crimes whereof the party shall have been duly convicted." Statutes of Oregon, 39.

**1848.**—By sec. 14 of the act of Congress establishing the territorial government of Oregon,<sup>1</sup> the ordinance of 1787 is extended over the Territory, and "the existing laws now in force in the Territory of Oregon, under the authority of the provisional government established by the people thereof," are recognized "so far as not incompatible with the Constitution of the United States and the principles and provisions of this act, subject nevertheless to be altered, modified, or repealed by the Legislative Assembly of the said Territory." By sec. 5, the suffrage is limited to white persons. In providing for appeals to the Supreme Court of the United States, no mention is made of cases involving a title to slaves or the possession of personal liberty, as in the acts establishing the governments of Nebraska, Kansas, New Mexico, and Utah.

**1849, Sept. 26.** "*An act to prevent negroes and mulattoes from coming to or residing in Oregon.*" Preamble: "Whereas, situated as the people of Oregon are, in the midst of an Indian population, it would be highly dangerous to allow free negroes and mulattoes to reside in the Territory, or to intermix with the Indians, instilling into their minds feelings of hostility to the white race." Sec. 1. "That it shall not be lawful for any negro or mulatto to come into or reside within the limits of this Territory"—not to apply to resident negroes &c., or their offspring. 2. Regulations respecting negroes, &c., arriving in vessels. 6. Powers of judges and justices of the peace.

<sup>1</sup> IX. St. U. S. 323. By sec. 6 the legislative power is declared to extend to "all rightful subjects of legislation not inconsistent with the Constitution and laws of the United States," and that the acts, if disapproved of by Congress, shall be null and void.

**1854**, Jan. 30. The above repealed. See Stats. of Or. (1855), p. 551. Ib. p. 130. Negroes, mulattoes, and Indians, or persons of one half or more of Indian blood, in an action or proceeding to which a white person is a party, shall not be competent to testify.<sup>1</sup>

**1859**.—Constitution of Oregon. In the name of the people of the State of Oregon.<sup>2</sup> Art. I. sec. 1. Declares "that all men, when they form a social compact, are equal in rights." There is no attribution to all men of any natural, inherent, or inalienable rights. 32. "White foreigners, who are or who may hereafter become residents of this State, shall enjoy the same rights in respect to the possession, enjoyment, and descent of property as native-born citizens, and the Legislative Assembly shall have power to restrain and regulate the immigration to this State of persons not qualified to become citizens of the United States." 35. "There shall be neither slavery nor involuntary servitude in this State, otherwise than as a punishment for crime whereof the party shall have been duly convicted." 36. "No free negro or mulatto not residing in this State at the time of the adoption of this Constitution shall ever come, reside, or be within this State, or hold any real estate, or make any contract, or maintain any suit therein, and the Legislative Assembly shall provide by penal laws for the removal, by public officers, of all such free negroes and mulattoes, and for their effectual exclusion from the State, and for the punishment of persons who shall bring them into the State, or employ or harbor them therein." Art. II. (containing seventeen sections), sec. 1. "All elections shall be free and equal." 2. Suffrage limited to white male citizens of the United States. 6. "No negro, Chinaman, or mulatto shall have the right of suffrage."

<sup>1</sup> In the same Code, p. 240, the governor is authorized to surrender fugitives from justice on demand, &c.

<sup>2</sup> Framed by a convention called by the territorial Legislature, and adopted by a vote of the people, Nov. 9, 1857—7,195 for, and 3,195 against, its adoption.

<sup>3</sup> Adopted on separate vote; 2,645 in favor of slavery, and 7,727 against slavery.

<sup>4</sup> Adopted on separate vote; 1,081 in favor of permitting the residence of free negroes, and 8,640 against the same.



## § 580. LEGISLATION OF WASHINGTON TERRITORY.

This Territory was organized in 1853, in the northern portion of the then-existing Oregon Territory, the laws of which are continued in the new Territory by the organic law.<sup>1</sup>

**1854.**—In the Code enacted at the first session of the territorial Legislature, no mention is made of negroes, or of slaves or servants.

**1855.**—An act amending the law of marriage declares, "that all marriages heretofore solemnized in this Territory, where one of the parties to such marriage shall be a white person and the other possessed of one fourth or more negro blood, or more than one half Indian blood, are hereby declared void." Ann. Laws, p. 33.<sup>2</sup>

<sup>1</sup> Act of Congress, March 2, 1853. *An act to establish the territorial government of Washington.* X. St. U. S. 172. Sec. 5. Restricts the elective franchise to whites. 6. Declares the legislative power, as in sec. 6 of the organic law of Oregon Territory. In providing for appeals to the Supreme Court of the United States, no mention is made of cases relating to slavery or freedom.

<sup>2</sup> An act of 1854, relating to practice in criminal prosecutions, sec. 6, authorizes the governor to surrender fugitives from justice. Code of 1854, p. 102.

The question may occur to the reader, whether the argument from international principles, already stated, would not support slavery in the British possessions north of the territory of the United States. It would seem that it should, in the absence of positive prohibition, unless the operation of those principles be restrained in this instance by the fact that those who first colonized the country were already, in another place, under the sovereign from whose will all law prevailing in the Territory colonized must derive its authority, and will therefore carry with them as a personal law the law of their former domicile, so far as applicable to their new situation. This law will be the common law of England, which may thereby acquire a territorial extent in these places, as it formerly acquired territorial extent in the colonies on the Atlantic coast at their first settlement. (*Ante*, Vol. I. pp. 118, 197.) This law, as now containing a universal attribution of personal liberty, would probably be held to prevent the recognition of involuntary servitude. (*Ante*, Vol. I. p. 377.)

At the time of printing these pages, bills for the organization of Colorado Territory, west of Kansas; Dacotah Territory, in the district lying north and west of Minnesota; and Nevada Territory, in the western part of Utah Territory, including the Washoe River mining region,—are reported to have been signed by the President, March 2, 1861. It is said that nothing in relation to slavery is contained in any of these bills.

In connection with the legislation of Texas given in preceding pages, it is to be noted that a "Secession Ordinance" is reported to have been ratified on a popular vote.



## CHAPTER XX.

### OF THE CONDITIONS UNDER WHICH PRIVATE INTERNATIONAL LAW MAY EXIST IN THE UNITED STATES.

§ 581. It was before shown that private international law is founded upon the doctrine, that while every person resident or present within the territorial limits of any political State is necessarily subject to its municipal (national) law, yet the relations of persons antecedently subject to some other jurisdiction, either as native, domiciled, or temporary subjects, will, within the jurisdiction of any one State, be regarded by its judicial tribunals as being, in some degree, exempt from the control of its own municipal (internal) law. It has been seen that the extent of this exemption, and of a corresponding allowance of some rule of foreign origin to determine the rights and duties in which those relations may consist, is judicially ascertained by maxims which the State itself may have sanctioned from its own views of international obligation and a sense of the duties of independent States towards each other and towards private persons; and the judicial application of these maxims may accord with the juridical practice of all civilized nations. But it is still to be remembered that these maxims have, within the jurisdiction of that State, juridical authority and judicial recognition solely because they are there made imperative by the same sovereign power which is the source of that municipal (internal) law whose extent they are said to modify. These maxims or principles may properly be distinguished from the municipal (internal) law, and be called international law, because they determine, in a sense, the relative operation of the municipal laws of different nations. But they are not

*law*, in the strict sense of the word, independently of the authority of the municipal (national) law of the State in which they are applied. They could not be judicially used to determine rights and duties of private persons, irrespectively of the will of that political power which the tribunal recognizes as the source of the municipal (internal) law. This is a necessary consequence of the doctrine, that the authority of each political State or nation is independent of any exterior rule.<sup>1</sup>

§ 582. Since the relation of persons to things, and of persons to other persons in respect to things, is necessarily contemplated in every department of positive law, the distinction between persons and things necessarily enters into international law. But, since personal freedom and the possession of individual rights are here principally considered, the distinction will be noticed as a topic of this division of the law only in determining the international extent of a discrimination of natural persons, as being either legal persons or objects of property.

§ 583. The territorial and personal extent of all private law, or all law which may affect the condition or rights of any natural person, within the geographical limits of the United States, depends upon the public and political law of their existence; that is, upon the actual distribution of sovereign power between the several States and the national government. As a consequence of such distribution, there is in each of the States a separate and distinct part of the municipal law resting on the share of sovereign power separately and locally held by the people of that State, and a co-existent part resting on the authority of the United States held by the national government, and having national extent.<sup>2</sup> Therefore, while

<sup>1</sup> See the second chapter of this work.

<sup>2</sup> According to Mr. Calhoun's theory, both laws, in any one State, rest ultimately upon one and the same political authority, *i. e.*, the people of the State; they are severally administered by different governments, each equally the agent of that people. 1 Calhoun's Works, 167, 168. Incidental to this theory is the doctrine that the State may, at its discretion, revoke the powers granted to the national government as its agent or attorney, thereby absolving all private persons within its limits from any *allegiance* which they could before have been said to owe to that government, and, of consequence, making *treason* against it impossible within such State; while any who may therein assume to act under the authority



each person within the limits of the United States remains everywhere under the same national law, he is always also under some particular or local subjection to a law proceeding from a State or a local authority. And this may be said of persons in the Territories of the United States, since the laws having a particular or local extent therein are, in this relation, of the same nature and extent as State laws, whether they proceed from the powers held by Congress, or by the national government, in respect to the Territories, or from some other possessors of legislative power.

§ 584. The distinctions of domicile and alienage arise from the division of organized civil society into separate political communities, and from the possibility of a relation between those communities, in respect to the operation of the laws proceeding from the political and civil power which they severally possess over private persons recognized as their subjects, under that condition of things herein called the natural or necessary law of nations.<sup>1</sup>

The recognition of these distinctions, and of persons whose legal relations vary according to the greater or less extent of the laws of their respective domicils and those of other jurisdictions to which they are or may have been actually subject, is that wherein private international law consists.<sup>2</sup> Now, since the powers reserved to the States, severally, as well as those delegated to the national government, are sovereign in their nature and mode of action, though neither of the two depositaries of power possesses separately the whole sum of the sovereign power incident to a national existence,<sup>3</sup> there may be a discrimination of persons with reference to the personal extent of the laws proceeding from these several sources. Persons subject to both or to either of these depositaries of power may be recognized as differently affected by the law proceeding from either, accordingly as they may or may

of that government, as declared by the Constitution of the United States, become either *traitors* to the State, or its *public enemies*, according as they may be domiciled inhabitants of the State or of some other part of the United States. The "secessions" of the present winter of 1860-61 are only the practical assertion of the doctrine and its consequences.

<sup>1</sup> *Ante*, §§ 49, 54.

<sup>2</sup> *Ante*, § 65.

<sup>3</sup> *Ante*, § 346.



not have been before subject to the law of some other jurisdiction. By this recognition there will arise, under the jurisdiction of each of these sources of municipal (internal) law, a co-existent private international law, and the distinctions of domicil and alienage will exist in reference either to the national law of the United States, or to the laws of some one State, or to both at the same time.

Thus, in every portion of the dominion of the United States there may be aliens who are such in reference to the laws of every State and to the national law. These, according to previous definition, adopted for the sake of brevity of expression in distinguishing alien persons, are herein termed *foreign* aliens. So there may be those who are aliens in reference only to some State or local jurisdiction and its local laws, being native-born or naturalized inhabitants of the United States having a domicil, in some other State or local jurisdiction, with reference not only to the dominion of the State, but also to that of the United States, who therefore are not aliens in respect to the national law when found in other parts of the United States. Such persons are herein designated *domestic* aliens.<sup>1</sup> This domestic alienage, or alienage existing only in respect to the local law of a State, is similar to that which existed during the colonial period in the case of British subjects towards the several jurisdictions of the British empire other than that of their particular domicil. Though now, or as it exists under the present political Constitution of the United States, it is even more distinct and definite than before; since the powers now held by the States separately are, by the public law of the United States, independent of any control or overruling authority similar to that claimed by the imperial government during the colonial period.<sup>2</sup>

§ 585. According to previous definition, the personal extent of the national and local municipal laws of the United States will depend chiefly upon the distinctions of domicil and alienage in reference to the several jurisdictions existing in the

<sup>1</sup> *Ante*, §§ 383-388.

<sup>2</sup> *Ante*, § 436.

United States. Yet, since even the domiciled inhabitants of any State or country may sometimes be regarded therein as sustaining obligations or having rights which arise out of a previous temporary subjection to the law of a foreign jurisdiction, the private international law may to a certain degree be regarded as affecting the relations of such persons, even when they have returned to their *forum domicilii*, and it will be necessary hereinafter to consider such a possible application of private international law to the condition or status of private persons within the United States. But, though it is a mere subjection of private persons to different jurisdictions at different times which gives rise to the widest application of private international law (conflict of laws), yet it is the distinction of persons as having or not having a domicile in respect to various laws which gives rise to the most palpable and striking manifestations of a private international law as contrasted with the municipal (internal) law.<sup>1</sup> It is this distinction which, in this and the succeeding chapters, will be mainly noticed, in reference to the several jurisdictions existing in the United States and the international or *quasi*-international law applying to the two classes of aliens above distinguished.

§ 586. The private international law is herein to be considered with reference to each of the depositaries of sovereign power recognized in the Constitution, according to the authority which each may have, under it, to limit, or to refuse to limit, the municipal (internal) law proceeding from itself, by the admission of the effect of laws of other jurisdictions, and, in so doing, to allow or disallow the existence and obligation of international private law.<sup>2</sup> Therefore, to ascertain the existing private international law affecting the condition or status of aliens of either class, it is necessary to consider—

1. The distribution or location of power to affect the rights and obligations of private persons by the creation of municipal (internal) law; which power is either in the United States and the national government as their representative, or in the States severally.

<sup>1</sup> *Ante*, § 54.

<sup>2</sup> *Ante*, § 388.



2. The actual modification of the municipal (internal) laws proceeding from those several sources of law, by the international law, as it has been received or allowed by each of those sources.

But since the Constitution of the United States is both public and private law, and, by the same words, evidences the distribution or investiture of political power and promulgates rules of action creating various rights and duties for private persons, as has been shown in another place,<sup>1</sup> it will be impossible to consider either of the two heads above designated without a partial examination of the other. This necessity will be more definitely explained in the following sections.

§ 587. In the statement of the distribution of sovereign powers under the Constitution and in the exposition of the national municipal law in reference to freedom and its contraries, it was shown that the power over absolute or individual rights and over those relative rights which are most essential in determining personal condition or status is found in the several States, existing as separate political organizations.<sup>2</sup> Therefore, the status or condition of all private persons, both of native-born or domiciled persons and of those who are alien by birth or domicil, would, within each State, be determined by the State powers and the coercive rule proceeding from them; and the law of each State, thus formed, will be either municipal (internal) or international law, according to its personal application to one or the other of these two classes of persons. The municipal (internal) law will be that which applies to persons as the domiciled inhabitants of the State, with no reference to any anterior subjection to the law of other jurisdictions. The international law will be that which applies to persons in reference to a former subjection to some other dominion; whether those persons have a domicil in the State (the forum of jurisdiction) or a domicil elsewhere, either in a foreign country (foreign aliens) or in another State or several jurisdiction of the United States (domestic aliens).

§ 588. But it will be remembered that the rule determining

<sup>1</sup> *Ante*, §§ 369, 408

<sup>2</sup> *Ante*, vol. I. pp. 483, 484.



in any state the condition of persons formerly subject to other jurisdictions must, for the state itself as a political person, be international law in the imperfect sense, only, of the word *law*; for it can only be that state's own acceptance of international obligations and rights. In other words, it will not be *law* in the strict sense except as identified, in respect to its authority, with the municipal law of the state.

This must be the character of whatever rule having an international effect or operation on private persons in any State of the United States may also be properly denominated international *law*—if the term is to be understood in the strict sense.

§ 589. But an exception may have been made by the Constitution of the United States to the exercise of the State or local power (reserved powers) in reference to persons anteriorly subject to other jurisdictions, that is, persons who in respect to the State or jurisdiction are either aliens, as before described, or persons who, while domiciled therein, have been temporarily subject to other jurisdictions; and some rule, having the effect or operation of international law by affecting such persons, may have been established by the Constitution; or power may have been granted to Congress to establish such a law.

Such provisions in the Constitution or the laws of Congress based upon such power would be identified in respect to their *source* and *authority* with the national municipal law; though in reference to the State or local jurisdiction and as modifying the extent of the law derived from the State or local authority they might be properly considered an international law for those States or jurisdictions.

§ 590. It is here supposed that such provisions in the Constitution or statutes of Congress might be so framed that they would apply, not only to the organized States of the Union, but also to the Territories and the District of Columbia as jurisdictions having, like the States, a local law. It will herein for the present be assumed that, if in such provisions the term *State* is alone employed, it may still perhaps be construed to include a Territory or the District of Columbia; and in the remainder of this chapter, when the term *State* is used, it will be understood as having, possibly, in this connection, that ex-

tended meaning, or as being equivalent to the words—*State or other jurisdiction which, like each of the States, has a several local law.*<sup>1</sup>

§ 591. If such constitutional provisions and statutes of Congress should, like other portions of the national municipal law, be taken to act imperatively on all persons within the jurisdiction of the United States, irrespectively of the share of sovereign powers belonging to each State severally and without the intervention or juridical action of the States exercised by each within its own jurisdiction, they would have a different character and authority, in respect to the jurisdiction of any State, from international law as ordinarily existing between independent nationalities, then being *law* in an imperfect sense only, and acting on private persons within any state or national domain by its own sovereign allowance or acceptance.

On the supposition above stated, these provisions and statutes would not depend for their international effect upon the will of the local dominion, the extent of whose municipal law they should limit or control.

§ 592. According to the view of the nature of the Constitution which has herein been taken, every provision contained in it which declares the rights and obligations of private persons (whether it operates as internal or as international law) is to be regarded as of itself sufficient to give legal existence to those rights and obligations in the relation which they constitute.

If, on the contrary, the Constitution is to be considered the formulary of a federal compact between States, each originally and severally possessing all the attributes of a sovereign nation; if it now operates in each State of the Union only by being identified with the continuing will of that State or of the people thereof as a several independent sovereignty; if it is always subordinate to and dependent on that will for its coercive effect on private persons,—then it would seem that all its provisions have the character of public international law only, and that the relations of private persons are not affected

<sup>1</sup> *Ante*, Vol. I. pp. 433, 434.



by any of its clauses, otherwise than as they might be by ordinary international treaties or compacts.<sup>1</sup>

§ 593. If, as some have maintained, the constitutional provisions the object of which is to secure within the jurisdiction of the several States rights and obligations of private persons, with reference to their previous subjection to the laws of other jurisdictions, were intended to act on the States themselves as political persons and to create a relation in which they, as such persons, should be the subjects of a right or of a duty, these provisions would have the force of public international law only, even though the legal relations of private persons may be involved in the maintenance of such right and the fulfillment of such duty. Or, whether such provisions would of themselves act on private persons and be classed as private international law—would depend on the question, whether, while acting on the States as their subjects, the Constitution had provided means for making them coercive independently of the action of the several States, or had left their effect upon private persons to depend, in each State, upon the action of the State power. In the latter case, these provisions would not be law in the strict sense, and they could acquire the force of positive law only by means of some juridical action on the part of the State, by which they should become part of that international law which in each State is, in its authority over private persons, identified with the municipal or local law of the State. If, on the contrary, a power had been vested by the Constitution in the government of the United States to enforce the duty and sustain the rights comprehended in that international relation by acting either on the States or their governments as political persons, or on natural persons within their territorial limits, these provisions would of themselves create legal relations. In this case, at least after the rights and obligations of private persons which are involved in the relation had been declared by the legislative action of the national government, they would have the same force and effect as private law which

<sup>1</sup> See this illustrated, 1 Calhoun's Works, pp. 206-212.



tended meaning, or as being equivalent to the word *other jurisdiction which, like each of the States, has local law.*<sup>1</sup>

§ 591. If such constitutional provisions and statutes should, like other portions of the national constitution of the United States, irrespectively of the foreign powers belonging to each State severally intervene or juridical action of the States exist within its own jurisdiction, they would have a power and authority, in respect to the jurisdiction from international law as ordinarily existing between nationalities, then being *law* in an independent and acting on private persons within any domain by its own sovereign allowance or

On the supposition above stated, these statutes would not depend for their international will of the local dominion, the extent of which they should limit or control.

§ 592. According to the view of the constitution which has herein been taken, every statute which declares the rights and obligations (whether it operates as internal or as external) be regarded as of itself sufficient to those rights and obligations in the constitution.

If, on the contrary, the Constitution be a formulary of a federal compact between several States severally possessing all the attributes of a nation; if it now operates in each State being identified with the constitution of the people thereof as a several entity, it is always subordinate to and does not exercise effect on private persons. Its provisions have the character of laws only, and that the relations of

<sup>1</sup> *Ante*, Vol.

would belong to the constitutional provisions and statutes of Congress described in a former section.<sup>1</sup>

§ 594. But though, according to the view herein taken, the clauses in the Constitution having this international or *quasi*-international character are limitations of the powers of the States, in respect to some relations of private persons, they resemble other clauses which contain restrictions on the States, and others which, according to their specific tenor, delegate power to the national government, in being the evidence of the "residuary" powers of the States in reference to other relations.<sup>2</sup> These clauses recognize the fact, that there are certain powers of sovereignty vested in the States which, except as by these clauses limited, are exercised independently and affect the condition and relations of all persons within each State as by its own local law. They therefore recognize or are consistent with the existence of a true international private law between the several States.<sup>3</sup>

§ 595. If among the provisions of the Constitution there were any declaring the rights and obligations of private persons within the limits of the United States, with reference to their anterior subjection to the laws of foreign jurisdictions, or any prescribing rules for the action of the national government in relations existing between the States, united and several, and foreign nations, such provisions would be a law in the strict sense for that government and for the several States, by being identified in respect to source and authority with the national municipal law, though affecting the international relations of the United States as a distinct jurisdiction among the family of nations. But, they would not be binding on the ultimately sovereign nation, as *law*, in the strict sense, however nearly they might coincide with the general international usage of other nations, since within the territory of the United States, regarded as a single political state, they would have authority only by the national will. They would only be the national reception of international right and duty, and be liable to change by the same power, irrespectively of the will of any external source of positive law.<sup>4</sup>

<sup>1</sup> *Ante*, § 591.    <sup>2</sup> *Ante*, § 361.    <sup>3</sup> *Ante*, §§ 587, 588.    <sup>4</sup> *Ante*, Vol. I. p. 499.



§ 596. So far as the relations of foreign alien persons are not fixed by any provisions of the Constitution, the private international law determines their condition under the national or the State jurisdiction respectively, only through its recognition and allowance by the government of the United States or by the several States individually; according to the nature of the power held by that government or by each several State, within their respective jurisdictions, over the relations of private persons without reference to the distinctions of domicil and alienage.

Wherein the relations of domestic aliens are undetermined by the Constitution or by the legislation of Congress under it, the operation of the respective local laws of the State of their domicil and of the State forum in which they may be found is also determined, in the latter, by international law only as it may be received and allowed by the source of the municipal (local) law therein; the several States being in this respect like independent nationalities.

§ 597. This international allowance may be regulated by positive legislation proceeding from the source of the municipal (internal) law of the jurisdiction in which the alien, or person anteriorly subject to another jurisdiction, is found. But besides, according to what has been said in earlier chapters respecting the nature of private international law, there are rules for the international allowance and application of different municipal laws to persons known as aliens or persons thus before subject to other jurisdictions, which, though not derived from positive legislation, may be judicially recognized as authoritative in making such allowance and application; rules which are distinguished in their personal extent from the municipal (internal) law of the jurisdiction in which they are applied, though identified with it in authority and always subject to modification by legislation proceeding from the political source of that municipal law.<sup>1</sup>

§ 598. The judicial allowance of any rules or maxims to have international effect in any particular case where specific legislation does not apply, is to be settled by the following considerations.

<sup>1</sup> *Ante*, § 122.



The principle, already stated, in regard to the continuance of the laws prevailing territorially in any dominion upon a change in the investiture of sovereign power over it,<sup>1</sup> extends to the recognition of rules formerly received within that dominion for international law, as it does to the recognition of the former municipal (internal) law, with the same exception in regard to laws conflicting with the existence or political conditions of the new sovereignty. Whatever therefore had been received as a rule of international intercourse for the colonies remained and had the same effect as private international law for the new States; modified in its application to private persons by the fact that Great Britain and the residue of the British empire had become a foreign dominion in all respects.

This international law would afterwards be liable to change in its various applications according to the distribution of sovereign power among the new States, still continuing parts of one nation by their public law.<sup>2</sup> This distribution has occasioned the distinction of a national municipal law and the local laws of the States, and a discrimination of persons as foreign and domestic aliens.<sup>3</sup> Until changed by positive legislation; then, the general principles already stated in the historical description of the colonial law will determine the extent of these different laws in respect to persons before subject to other jurisdictions. They will be judicially taken to determine the extent of the national municipal (internal) law and of the State municipal (internal) law to foreign aliens, and the allowance, as to them, of the effects of foreign laws. They will in like manner be taken to determine the extent of the local municipal (internal) laws of the several States to domestic aliens, and the allowance, as to them, of the effect of the laws of their domicil. These general principles, illustrated in the customary jurisprudence of the colonies, together with the constitutional provisions and the legislation of Congress and of the several States, having either international or *quasi*-international effect, will therefore constitute the private international law of the United States. These will be the law

<sup>1</sup> *Ante*, § 123.

<sup>2</sup> *Ante*, § 342.

<sup>3</sup> *Ante*, §§ 377, 384.

applicable by judicial tribunals, either those of the national government or those of the several States according to the constitutional distribution of sovereign powers between that government and the States, in determining the rights and obligations of persons in reference to anterior subjection to other jurisdictions, including the condition or status of those who are aliens either to the United States or to some one of the several States.

§ 599. According to the various extent of the powers held by the national government and the States this international law will be either national or local law.

But in its application to persons it may also be distinguished as either *domestic international law* or *foreign international law*. The priority in exposition of one or the other of these portions of the international law is determined by the following considerations.

In the exposition of the fundamental principle of international law determining the judicial allowance or disallowance (irrespective of legislation having international effect) of rights and obligations of private persons created by the laws of jurisdictions to which they have anteriorly been subject, it was shown that the presumptive maintenance of relations created by the foreign law, which was there stated, will be controlled by whatever principles of the local law may be of universal personal extent, or may attribute rights or obligations to *all* persons within the forum of jurisdiction and being in certain circumstances of natural condition.<sup>1</sup>

From this it appears, that, in the judicial determination of private international law, the existence of a local or internal law must be presupposed;<sup>2</sup> and therefore that, in the order of historical development, the exposition of the internal law of a country precedes that of the international law as therein received.

To whatever extent the State tribunals may determine the rights and obligations of foreign or domestic aliens, under customary private international law, they must necessarily dis-

<sup>1</sup> *Ante*, § 88.

<sup>2</sup> That is, in every forum wherein law is known as having had territorial extent. The exceptional case of countries not before inhabited by permanent civilized communities has been repeatedly noticed in the historical parts of this work.



criminate such principles of the local or internal law of the State as have universal personal extent in and for its several jurisdiction.

So, too, in determining the rights and obligations of foreign aliens under customary private international law, it will be necessary for the national judiciary in like manner to discriminate whatever principles contained in the national municipal (internal) law may have this universal extent.

The law which, in the several States, determines the status of domestic aliens, and which is herein designated *domestic international law*, is a portion of the municipal (internal) law of the United States regarded as a single integral state in the family of nations. It is, in its authority, identified either with the national law or with the local law of a State. Hence, in order to know what principles have that universal personal extent under the national jurisdiction which will limit the recognition, by the national tribunals, of rights and obligations created by foreign laws, it is necessary to examine first this domestic international law, so far at least as it may be identified with the juridical will of the nation, as well as that portion of the national law which is more obviously internal in its character and operation.<sup>1</sup>

It has herein already been assumed, that, wherein their rights and obligations are not determined by the national law, the foreign alien and the domestic alien are in the same position in respect to the sovereign powers held by the States severally—the “reserved” powers. Therefore the law which in each State, while resting on the local authority, determines the rights and obligations of domestic aliens, is not internal law of the State in contrast with that which, resting on the same authority, determines the rights and obligations of foreign aliens. Nevertheless, from the geographical propinquity of the States and their political and other affinities, the juridical action of the State power in reference to domestic aliens must be presumed to have preceded its like action in reference to foreign aliens. If not more nearly connected in character with the internal law of the State, the domestic international law of

<sup>1</sup> *Ante*, § 398.



the State must, as compared with its foreign international law, be at least first in the order of historical development; and therefore, with the internal law, it may be judicially referred to for the exhibition of whatever principles may, by having universal personal extent, control the judicial allowance of the laws of foreign countries.

The exposition of all law determining the rights and obligations of foreign aliens—*foreign international law*, as herein designated—is therefore naturally preceded by that of the *domestic international law of the United States*, in its two principal divisions:

1. That law which, though international by the character of the persons to whom it applies, is identified in its source and authority with the *national municipal* (internal) law, and which therefore, if acting on private persons, is law in the strict sense independently of the will of the several States in which it operates; which division, in distinction from the second, has herein been denominated *quasi-international law*.

2. That which, though international by the character of the persons to whom it applies, is identified in its authority with some local municipal (State) law; and which, if distinguished from this local law in its origin, source, or authority, is not law in the strict sense of the word.

The first of these is found either—

- a.* In the Constitution itself, operating as private law; or,
- b.* In the legislation of Congress under the Constitution.

## CHAPTER XXI.

OF THE DOMESTIC INTERNATIONAL LAW OF THE UNITED STATES.  
THE SUBJECT CONTINUED. GENERAL CONSIDERATIONS RESPECT-  
ING THE PROVISIONS OF THE FOURTH ARTICLE OF THE CON-  
STITUTION.

§ 600. The constitutional provisions which, under the distribution made in the last section, may form the first subdivision of the domestic international law identified in authority with the national municipal law, are herein to be considered principally in their effect upon relations of private persons in which those rights and obligations are involved which enter into the condition of freedom and its contraries.

If any clauses of the Constitution have the effect of private international law for the several States, by limiting or extending the operation of their respective local laws, they are, it may be assumed,<sup>1</sup> those contained in the first and second sections of the Fourth Article, which are as follows:

### SECTION I.

"1. Full faith and credit shall be given in each State to the public acts, records, and judicial proceedings of every other State. And the congress may, by general laws, prescribe the manner in which such acts, records and proceedings, shall be proved, and the effect thereof."

<sup>1</sup> Duponceau, in his Brief View of the Constitution, gives only a few lines to this Article, on p. 45, but they are worth noting. They are:—"Public law between the States.—This is what Tacitus calls *humanitatis commercia*, and what has been still more elegantly called *fœdera generis humani*. Our Constitution says but little on this important subject. What it says, however, is susceptible of much development, and it is hoped will receive it." It is herein held that the caption would be more correctly given as *Public and private law between the States*. The sections above cited have the character of private law, by acting directly on private persons; the other sections of the Article have rather the character of public law.

## SECTION II.

"1. The citizens of each State shall be entitled to all privileges and immunities of citizens in the several States.

"2. A person charged in any State with treason, felony, or other crime, who shall flee from justice, and be found in another State, shall, on demand of the executive authority of the State from which he fled, be delivered up, to be removed to the State having jurisdiction of the crime.

"3. No person held to service or labor in one State, under the laws thereof, escaping into another, shall, in consequence of any law or regulation therein, be discharged from such service or labor, but shall be delivered up on claim of the party to whom such service or labor may be due."

§ 601. In these provisions rights and obligations are expressly or impliedly spoken of as having legal recognition in, or as attaching to private persons under State jurisdictions other than that in which the relations which those rights and obligations constitute were first created; and persons are considered as appearing in some one of the States in the character of aliens to the local law of that State, and as having rights or sustaining obligations under the law of their previous domicil, or that of some one State jurisdiction to which they have been previously subject. They regulate, in some degree, the application of State laws to persons coming from other States, and maintain, in otherwise independent jurisdictions, relations which exist under the dominion of another State. They are therefore international in their *effect*.

But though these provisions are taken to rest for their authority upon the same political power as do other provisions of the Constitution, there may be still some doubt as to the persons who are the immediate subjects of the law which they contain. That is, a question may be raised whether the States, in their political personality, are subjects of the relation created by them, or whether, like other provisions of the Constitution, they operate on natural persons within the limits of the United States independently of the powers vested in the States severally and are law within each State by resting on the national authority of the United States, irrespectively of



the juridical action of the States as separate polities. In the latter alternative they evidently have a more positive and obligatory character, as law, in reference to the State jurisdictions, than those ordinary rules of international intercourse which are law within any national jurisdiction in an imperfect sense only, or are not law except as identified with the municipal law thereof, whether they be derived from the law of natural reason as judicially interpreted (common law, including the historical *law of nations*), or from positive legislation, including the mutual agreements of independent states. But, if the first alternative is to be adopted, it will depend upon the *means* contemplated in the Constitution for making them effective, whether they are equivalent merely to ordinary international agreements, or may operate on private persons with the force of the national municipal law.<sup>1</sup>

In reference therefore to that relation of superior and inferior which is implied in them and their character as public law—i. e., law determining the possession and extent of juridical power and the rights and duties of public persons—there are four different views which may be taken of these provisions, involving different conceptions of their practical operation on the relations of private persons; and though all these views or constructions<sup>2</sup> may not have actually been advanced, in judicial investigations, as to more than one of these provisions, they will be here stated before attempting any original investigation of any part of this Article.

§ 602. 1. According to the first of these constructions, these provisions have only the force of a compact between the States, as distinct political personalities, each sovereign within its own jurisdiction; and, regarded as an international rule of action for the States, they are *law* in an imperfect sense only, affecting private persons within the limits of the several States only by the will and consent of the local and several sovereignty and by becoming identified with the local law—the juridical will of that sovereignty; the States being the parties bound by

<sup>1</sup> *Ante*, § 593.

<sup>2</sup> These views will hereinafter be called *constructions*, because it is supposed that their correctness is to be determined by *construction*, as distinguished from *interpretation*. See *ante*, I. p. 434, n. 1.

or subject to them, and at the same time the several sources from which they are to derive their coercive effect upon private persons within the limits of each State.

The three other constructions alluded to agree in attributing to these clauses the force of law in the strict and proper sense, according to that estimate of the nature of the Constitution which is founded on the fact that it is announced as the will of an integral possessor of sovereign power.<sup>1</sup> But they differ in respect to the *persons* who are taken to be bound by the provisions as they stand in the Constitution.

2. According to the second construction, the States are still regarded as the immediate subjects of the rule of action contained in this Article; the duties which it creates being still taken, as under the first view, to be international on the part of the States, as political persons, towards the other States, or towards persons claiming rights as the inhabitants of other States. It will be perceived that the duties which, according to this theory, are created by these provisions, differ in no respect from those arising under the first construction; and the difference, in respect to effect upon private persons, arises from an inference drawn from the coercive character attributed to this part of the Constitution, which is,—that, because intended to be obligatory, there must be some person, representing the authors of the law, who may carry it into effect independently of any autonomic action of the States who are its subjects.

3. According to the third construction, while these clauses act on private and public persons specifically indicated, to the extent of giving to them a subsisting legal right, they simultaneously act upon the national government, to the extent of attributing to it a duty correlative to the right given to those persons; thus creating a legal relation between those persons and the national government under a law which, as private law and law in the strict sense, may be applied by judicial and ministerial officers, or, as public law, may authorize the government to act by way of fulfilling the duty imposed upon it.

4. According to the fourth construction, while these clauses are taken to be, as under the preceding view, a law in the

<sup>1</sup> See *ante*, Vol. I. § 359, second head.



strict and proper sense, private persons, only, are its immediate subjects and the rights and duties created by it are the constituent parts of a relation between private persons. According to this view these clauses have the effect of private international law, in applying to persons distinguished by their domicile, but are binding on all persons within the United States as a national municipal (internal) law, without regard to the limits of the State jurisdictions and their political existence, except as they are the jurisdictions by the existence of which private persons are distinguished as either domiciled or alien; and, having this character, they are applicable by judicial and ministerial officers of the national and State governments, as are other portions of the national private law.

§ 603. Although these provisions are in juxtaposition in the Constitution, and are alike in having an international effect, there is apparently no necessity for supposing that a similar construction in this respect must be given to each one of these distinct clauses of the first and second section of the Fourth Article. They therefore require to be severally considered, in reference to the foregoing remarks, although they are assumed to have a like international purpose.

It will also be noticed, in reference to these clauses, that their character as public law, or connection with the possessors of sovereign power in the United States, may be distinguished from their purpose and object as private law,—their effect upon private persons,—which is to be separately ascertained; and that any one clause may receive the same interpretation and construction, in reference to such effect upon private persons, under either of the views above stated. In other words, while the ultimate consequence, as to private persons, from any one of these clauses, may be different, according to the construction which may be adopted for it as public law, yet, under either, the intended effect upon the legal condition of private persons must be supposed to be the same.

Therefore, although it may be more in accordance with the method of analysis which has been herein pursued, in examining each several provision, to determine first its proper construction as public law and whether the States or private



persons are the *subjects* of the rights and duties it creates, that question may in each case be postponed to that of the application of such provision as private law and to the determination of the rights and obligations of private persons under it, so far as they may be connected with the contrasted *conditions* of freedom and of bondage.

Indeed, although some one of the above-enumerated views or constructions must always be assumed before any one provision could practically affect private persons, yet, in point of fact, the question of the proper construction of these provisions, in reference to the actual distribution of sovereign power between the several States and the national government, has not been hitherto judicially noticed, except after legislative action in reference to them on the part either of the States or of the Congress of the United States. It will be in accordance with the historical method of exposition to notice the proper construction of these provisions, as public law, only in connection with such legislative action.

§ 604. The terms employed in the promulgation of law are to be interpreted according to their anterior juridical use by the same possessors of sovereign power, or those to whose place and dominion they may have succeeded,—the identity, in their successive juridical action, of different political persons, founded upon the historical fact of occupying the same territorial jurisdiction or domain, being a necessary or natural principle of jurisprudence. In considering those clauses of the Constitution which have the force of a national municipal (internal) law in respect to relations incident to personal condition or *status*, it was held,<sup>1</sup> that the meaning or effect of the terms in which they are expressed is to be determined by their former use in juridical acts deriving their authority from the same source of power and operating with the like extent, as a municipal (internal) law, within the same jurisdiction. These provisions of the Fourth Article are derived from the same political authority and are equally the public and private municipal law, *i. e.*, internal, law of one country. They therefore must be interpreted and construed by principles ap-

<sup>1</sup> *Ante*, §§ 413, 414.

plying to all legislative acts. But, under any construction which may be given to any of these provisions, they are all assumed to indicate an international or a *quasi*-international relation, whether it be a relation between the States, or between States and the inhabitants of other States, or between private individuals discriminated as inhabitants of different States, and the persons standing in the relation indicated are regarded as the subjects of international rights and obligations. From these admitted characteristics the intended effect of these provisions upon relations of private persons cannot be determined without reference to rules of interpretation and construction which would apply to international agreements; even though their legal force or operation, when their meaning has been ascertained, should be held to be not merely that of ordinary international agreements between the several States whose jurisdiction and laws are therein referred to, but that of private law resting on one sovereign will, having equal authority throughout the United States.<sup>1</sup>

§ 605. The standard of the meaning of the contract must be one common to all the parties to that contract. The force of international contracts, when judicially applied to private persons, is determined by principles taken to be a rule for states, and called, in that sense, international law or law of nations. If such a rule can exist and be judicially applied, there must be a similar juridical use by different states or nations of the terms which define those relations of private persons which grow out of their co-existent, but independent, existence and reciprocal action. A principal part of international law, whether public or private, consists in definitions or statements of relations so internationally recognized.<sup>2</sup> The terms used in an international compact, having reference to relations arising out of the reciprocal action of the constituent parties upon private persons, must be judicially explained or interpreted by their anterior juridical use by the same parties in reference to similar relations. To interpret the terms used in these in-

<sup>1</sup> *Marlatt v. Silk*, 11 Peters, 22; Judge Wayne's opinion in *Prigg's case*, 16 Peters, 642; and note to the opinion of the Court in *Sims' case*, 7 Cushing, 311.

<sup>2</sup> *Ante*, § 49.



ternational or *quasi*-international provisions of the Constitution, reference must be had to the most common juridical use made of them by the States, or their political predecessors, in determining the same class of relations.

Since there was formerly within the same territorial dominion a national municipal law which, in its application to persons, had the effect of private international law within the several colonial jurisdictions into which that dominion was divided, and also an ordinary international law having similar effect between the several colonial polities, though dependent in each upon its own several will,<sup>1</sup> that municipal law having national extent and authority, and that international law having local extent and authority but a general recognition under the several and independent juridical action of the different colonies or States, must together be taken for the international law formerly prevailing within the dominion of the present United States and enforced by their political predecessors. The use of words which formerly obtained in the application of each of these divisions of that law to persons and things, or circumstances and relations, correspondent with those contemplated in these provisions, would be properly received as indicating the verbal usage common to the parties who established the Constitution, in interpreting these international or *quasi*-international provisions. If the terms employed in the Constitution have also had a particular meaning in the local municipal (internal) laws of the several States, it will be controlled by the use they may have had in those legislative and judicial acts which were expository of this international or *quasi*-international law and usage as received by the possessors of sovereign power who established the Constitution, or by those who were their political predecessors in the same territorial jurisdiction; whether the rule announced by such acts emanated from the central imperial authority and operated as law in the strict sense, or from the different local authorities, and was law in the imperfect sense only, as between the colonial jurisdictions or the succeeding States, because dependent, for

<sup>1</sup> *Ante*, Ch. vii.



its effect on private persons within each, upon their several will and consent.

Besides, when the actual use of words in the jurisprudence of legislating states has not been sufficiently determinate to indicate legislative intention, the anterior action of the law-giver in regard to the same subject-matter may be referred to, to interpret laws, treaties, or any act of a legislative character.<sup>1</sup> The particular meaning of the words of these provisions in the Fourth Article may be sought by comparing the various possible meanings, as known by usage of words, with the known effects of the antecedent juridical action of the constituent parties, or their political predecessors, in reference to persons and things in corresponding circumstances; or, in other words, by comparing the possible effects of these provisions with the effects of the antecedent international law and usage obtaining among the colonies and States in their exercise of a several and correlative jurisdiction, over persons and things, similar to that which the States now have under that distribution of power which is established by other parts of the Constitution.<sup>2</sup>

§ 606. Or, to repeat in substance the same rule of interpretation under a more condensed form, whether these provisions are or are not to be regarded as law in the strict sense and the private municipal (internal) law of the whole country as one nation, and whether the States or private persons are to be regarded as their immediate subjects; yet, to ascertain their effect on the relations of private persons, reference must be had to the anterior juridical action of the constituent parties in the de-

<sup>1</sup> Dig. L. I., t. 3, *De legibus*, etc., 37. Si de interpretatione legis quaeratur, in primis inspicendum est, quo jure civitas retro in ejusmodi casibus usa fuisset; optima enim est legum interpretatio consuetudo. The custom meant seems to be one which existed before the statute (*lex*) was enacted. Yet the last sentence is often quoted as meaning that the customary interpretation of a statute is the best, or the correct interpretation: e. g. Sedgwick on Statutory and Constitutional Law, 255. But of what use would such a rule be when a statute is to be interpreted for the first time.

<sup>2</sup> Such a determination of the meaning of words by the former law is probably distinguished as *construction* by some of those who make a distinction between interpretation and construction. The same international law and usage will hereinafter be referred to in the *construction* of these provisions as public law; that is, in ascertaining which of the four views or constructions of these provisions, already mentioned *ante*, § 602, is to be adopted.

termination of relations arising under the same or parallel circumstances; that is, to the international private law of the colonial period and the periods of the revolution and the confederation, as it existed in the two forms already described, viz. :—

1. The municipal law of the whole empire, affecting relations between the inhabitants of its various jurisdictions as constituting the parts of one integral nation.

2. That rule of imperfect authority, more properly called *international*, which prevailed among these various jurisdictions as they were independent and distinct, under their several acceptance of international law as a rule for political communities, and which rested within each such jurisdiction upon its several local authority, for its legal effect upon private persons; though, also, judicially derived from the general juridical practice of nations, as indicating the rule of natural reason regulating the international allowance of the effects of different municipal laws.<sup>1</sup>

<sup>1</sup> *Ante*, §§ 86, 93.

## CHAPTER XXII.

OF THE DOMESTIC INTERNATIONAL PRIVATE LAW OF THE UNITED STATES. THE SUBJECT CONTINUED. OF THE FIRST SECTION OF THE FOURTH ARTICLE OF THE CONSTITUTION.

§ 607. The first of the provisions of the Constitution which are herein before spoken of as having a specific international character is that contained in the first section of the Fourth Article, viz. :

"Full faith and credit shall be given in each State to the public acts, records, and judicial proceedings of every other State. And the Congress may, by general laws, prescribe the manner in which such acts, records, and proceedings shall be proved, and the effect thereof."

If the acts, records, and judicial proceedings here spoken of are manifestations of the juridical power of the States by which rights and obligations in relations incident to conditions of freedom and its contraries are created or proved to exist,<sup>1</sup> this provision may obviously be of much importance in connection with the subject of this treatise.

§ 608. The first in importance of questions of interpretation,<sup>2</sup> arising under this clause, is the general one of its object, or, more specifically, what is intended by giving "full faith and credit to," &c., and what is that "effect" which the Congress is hereby empowered to prescribe by general laws.

Of the existing juridical opinion which in this inquiry it is proper first to examine,<sup>3</sup> the first in order of time,<sup>4</sup> if not

<sup>1</sup> As for example in *Coleman v. Guardian of negro Ben*, 2 Bay, 485.

<sup>2</sup> See *ante*, § 603.

<sup>3</sup> For remarks on the order to be pursued in these inquiries, see *ante*, § 490.

<sup>4</sup> In proportion to its nearness in time to the adoption of the Constitution a statute may have a peculiar authority in interpretation, on the doctrine of *contemporaneous* exposition, distinct from that authority which it has in being *legislative* exposition. See Sedgwick on Construction, p. 593; and for cautions in applying the doctrine, see Story's Comm., § 406.



in order of authority, would be the legislative action of Congress, if intended as an exercise of the power here granted.<sup>1</sup>

The act of Congress, of the 26th of May, 1790, is entitled, *An act to prescribe the mode in which the public acts, records, and judicial proceedings of each State shall be authenticated, so as to take effect in every other State,*<sup>2</sup> the first section of which is as follows: "The acts of the Legislatures of the several States shall be authenticated by having the seal of their respective States affixed thereto. The records and judicial proceedings of the courts of any State shall be proved or admitted in any other court within the United States by the attestation of the clerk, and the seal of the court annexed, if there be a seal, together with a certificate of the judge, chief justice, or presiding magistrate, as the case may be, that the said attestation is in due form. And the said records and judicial proceedings, authenticated as aforesaid, shall have such faith and credit given to them in every court within the United States, as they have by law or usage in the courts of the State from whence the said records are or shall be taken."

The act of March 27, 1804,<sup>3</sup> entitled, *An act supplementary, &c., i. e., to the above.* The first section, providing for the authentication of "all records and exemplifications of office books which are or may be kept in any public office of any State, not appertaining to a court," concludes—"and the said records and exemplifications, authenticated as aforesaid, shall have such faith and credit given to them in every court and office within the United States, as they have by law or usage in the courts or offices of the States from whence the same are or shall be taken." The second section of the same act is as follows: "All the provisions of this act, and the act to which this is a supplement, shall apply as well to the public acts, records,

<sup>1</sup> The question of the relative authority of the three departments of the government, in deciding on the extent of the powers vested in each by the Constitution, is one of public law which cannot be here examined. It may be admitted that in the ultimate application of law to relations of private persons in cases falling within the judicial power, the judiciary is supreme—without allowing that the legislative and executive will be bound to limit their subsequent action, in reference to other persons, by the rule of public law which should be enunciated by the judiciary in those cases.

<sup>2</sup> I. St. U. S. 122, 2 B. & D. 102.

<sup>3</sup> II. Stat. U. S. 298, 3 B. & D. 621.

office books, judicial proceedings, courts, and offices of the respective Territories of the United States, and countries subject to the jurisdiction of the United States, as to the public acts, records, office books, judicial proceedings, courts, and offices of the several States."

§ 609. But in determining how far Congress has by this legislation used, or proposed to use, the power which has been granted to "prescribe the effect of," &c., it is necessary first to refer to judicial opinions in cases wherein these statutes have been relied on as determining rights and obligations of private persons.

From a review of the cases wherein the judgment of a court of some one State has been pleaded<sup>1</sup> in the courts of another State, or in some one of the national courts, it appears to have been settled doctrine, at least since the year 1813, that the record of the judgment of a court of ordinary or general jurisdiction, in a matter of civil<sup>2</sup> controversy, authenticated in the manner prescribed by the statute, is, in all courts within the United States, conclusive evidence of the right and obligation decided by it, and that the merits of the original cause of action will not be investigated in the forum, except as they might be in the State wherein the judgment was rendered,—*provided* the party against whom it is produced was actually, by service of process or by appearance, within the jurisdiction of the court rendering the judgment.

Although the judgments of courts of limited jurisdiction<sup>3</sup>

<sup>1</sup> Pledged, *i. e.*, either sued on, or relied on as defence.

<sup>2</sup> That a conviction for felony does not render a witness incompetent in other States. *Commonw. v. Green*, 17 Mass. 543; but *contra*, *State v. Chandler*, 2 Hawks, 400.

<sup>3</sup> The rule that the acts of courts of limited jurisdiction must be shown to be within their powers (*ante*, vol. I. p. 501, n. 1), has been held to apply in pleading judgments of such courts from other States. See *Thomas v. Robinson*, 3 Wend. 269; *Sheldon v. Hopkins*, 7 Wend. 435; *Elliot v. Ray*, 2 Bl. Ind. 31. The question, whether the court will take judicial cognizance of the law of a sister State as to the jurisdiction of the inferior court whose judgment is pleaded, or will require proof thereof as of matter of fact, has been variously decided. The same question seems to occur in pleading the judgment of any court of another State. (As it is only the United States courts which take judicial notice of the laws of the several States as domestic laws. *Greenleaf on Ev.* §§ 489, 490.) See *Clark's Ex. v. Day*, 2 Leigh, 175, and the argument and cases cited in the notes by Cowen, Hill, and others, to the American editions of Phillips on Evidence, Part II. ch. 5, sec. 4. Perhaps this judicial cognizance of the law determining the existence and authority of the courts, &c., whose records, &c., are to be proved in the



have in many cases been excepted from the benefit of the statute,<sup>1</sup> the later opinion seems to be, that they are included in the descriptive words of the Constitution, and that, if they be courts of record, the records and judicial proceedings of such courts may be proved under the statute, with the same conclusiveness which may thereby have been given to those of courts of ordinary jurisdiction.<sup>2</sup> And in some cases, where the court has regarded conclusiveness as the effect of the Constitution rather than the statute, they have been held conclusive when proved by common-law methods.<sup>3</sup>

The conclusiveness of judgments coming within the rule has, in the majority of judicial opinions, been considered incidental to that giving full faith and credit to the public acts, &c., which is enjoined by the first clause of the provision. There is a minority, of those supporting that conclusiveness, who hold that conclusiveness to be an effect produced by the statute of Congress, and beyond any consequent upon giving full faith and credit to those acts, &c.<sup>4</sup>

manner prescribed, is precisely what is meant by giving full faith and credit. In *State of Ohio v. Hinchman*, 27 Penn. (3 Casey), 483, the court held, that it should, in these cases, notice judicially the laws of the other States, as it notices laws of the forum. It derived this doctrine from the assumption that in these actions the State court is an inferior court in respect to the Supreme Court of the United States, and that as that court would judicially notice the laws of the State in which the judgment originated, so should its inferior, the State court in which the action was brought. See, also, *Rogers v. Burns*, ib. 527, and *Baxley v. Linah*, 16 Penn. (4 Harris), 243.

<sup>1</sup> *King v. Van Gilder*, 1 Chipman, 60; *Warren v. Flagg*, 2 Pick. 448; *Witherwax v. Averell*, 6 Cowen, 589; *Cole v. Driskel*, 1 Blackf. Ind. 16; *Cone v. Cotton*, 2 Id. 82; *Kean v. Rice*, 12 S. & R. 203.

<sup>2</sup> *Green v. Sarmiento*, 1 Peters, C. C. 74; *Taylor v. Barrow*, 10 Foster, 78; *Robinson v. Prescott*, 4 N. H. 450; *Mahurin v. Bickford*, 6 N. H. 567; *Thomas v. Robinson*, 3 Wend. 267; *Snyder v. Wise*, 10 Barr, 157; *Bissell v. Edwards*, 5 Day, 363; *Starkweather v. Loomis*, 2 Ver. 573; *Blodget v. Jordan*, 6 Id. 580; *Scott v. Cleveland*, 3 Mon. 62.

<sup>3</sup> *Thomas v. Robinson*, 3 Wend. 269; *Silver Lake Bk. v. Harding*, 5 Hammond, Oh. 545, S. C. 1 Wright's Oh. 430; *Kuhn v. Miller*, Id. 127.

<sup>4</sup> It is difficult to distinguish the prevailing doctrine on this point among the opinions which agree as to the conclusiveness of the judgment. But this difference of opinion has been connected with a difference as to the syntactical construction of the last clause of the provision; some reading the grant as one of power to prescribe the effect of the manner of proof of the public acts, &c.; others, as one of power to prescribe the effect of the public acts, &c.; and the first reading seems now generally adopted (*Story's Commentaries*, §§ 1312, 1313) by the majority of those who maintain the conclusiveness of the judgment. In *Commentaries*, § 1312, Story represents the first reading as adopted exclusively by those who maintain the conclusiveness of the judgment; and the latter, as received only by those who deny it. But this seems to be a mistake. The difference as to the syntax is found among those who deny as well as among those who maintain the



§ 610. The rights and obligations of private persons which may, in one of the States, be determined according to the tenor of a judgment obtained in another State, must be attributed to the operation of either the local law of the forum of jurisdiction or of the national law (*quasi-international*) contained in the Constitution and the statute of Congress. But, if attributed to the latter, the legal assertion and denial of these rights and obligations will be a case arising under the Constitution and laws of the United States and within the judicial power of the United States irrespectively of the character of the parties.<sup>1</sup> The conclusiveness of the judgment in these cases has been ascribed either to the Constitution or to the statute of Congress; and whenever the judgment has been held conclusive evidence, the court has at the same time enforced the right and obligation declared by it. Unless, therefore, the conclusiveness of the judgment as evidence is something distinguishable from its operation or efficacy in determining a relation between persons within the forum, the right and obligation enforced must, in the adjudged cases, have been ascribed to national (*quasi-international*) law, as opposed to local or State law. The leading cases will therefore be here examined with reference to this distinction.<sup>2</sup>

§ 611. In *Armstrong v. Carson's Ex.* (1794), 2 Dallas, 302, Wilson, J., in U. S. C. C., supported the conclusiveness of the record, deciding that *nul tiel record* was the only plea allowable. But his opinion does not notice the distinction between effect as evidence and legal operation on the rights of parties.<sup>3</sup>

conclusiveness. Story, *ibid.*, says that it "is not, practically speaking, of much importance which interpretation prevails." If their conclusiveness is to be admitted, it is not of much importance as to judgments susceptible of proof under the present statute, which reading is adopted. But in respect to such as have been proved by other methods (see *post*, p. 269, n.) and those of some justice's courts, it is important (see *ante*, p. 246, n. 3); and as to "public acts" (see *post*, § 621). It is also important in determining the question stated in section 609.

<sup>1</sup> See *ante*, § 368.

<sup>2</sup> It will be noticed that the discrimination here attempted becomes important, and even possible, only because in each State of the Union there is a national and a local law, to one or the other of which every legal effect must be ascribed. In England, foreign judgments are by the weight of later authority held conclusive evidence (1 Starkie's Ev. p. 228, 6th Am. Ed.). But there the right and obligation which is enforced under the foreign judgment cannot derive its legal existence from any other authority than that which declares such judgment conclusive as evidence; there being but one source for all law prevailing in the forum.

<sup>3</sup> Th. 302:—"Whatever doubts there might be on the words of the Constitution of Congress effectually removes them, declaring in direct terms that

§ 612. In the case of *Hitchcock v. Aiken* (1803), 1 Caines, the judgment of a court of another State was, by the majority, consisting of Justices Radcliff and Kent and Chief Justice Lewis, held *prima facie* evidence only. They considered, or at least Radcliff and Kent were of opinion, that the words "effect thereof," in the Constitution, related to the "acts, records, and judicial proceedings," not to the manner of proof therein also spoken of, and that the giving "full faith and credit" to the record of another State, as thereby required, involved only its recognition as a genuine testimonial of the juridical action of a State, without ascribing to it any operation or effect in the forum to maintain any legal right and obligation. They thought Congress had been empowered to give the judgment an effect whereby the right and obligation, existing under it in the State where it had been rendered, should become actualized or realized in the forum; and that the judgment could not be held conclusive without admitting that it had acquired this operation or effect under the statute. But they were of opinion that Congress had, beyond providing for the proof of the record, done no more than was already effected by the first clause of the provision.<sup>1</sup>

Of the two members of the court who maintained the conclusiveness of the judgment, Thompson, J., agreeing with the majority that the words "effect thereof" related to the "acts," &c., and not to the proof, held that Congress had, under the power granted, given effect to the judgment, and Livingston, J., considered the words "effect thereof" as relating to the manner of proof, and supposed that the operation of such proof in authenticating such "acts," &c., was the only effect within the power of Congress. In maintaining the conclusiveness of the judgment<sup>2</sup> he attributed it solely to that giving faith and credit

the record shall have the same effect in this court as in the court from which it was taken."

<sup>1</sup> The same court afterwards adhered to the doctrine of this case in *Post v. Neafie*, 3 Caines, 26; *Jackson v. Jackson*, 1 Johns. 424; *Taylor v. Bryden*, 8 Ib. 173; *Paulding v. Bird's Ex.*, 13 Ib. 205.

<sup>2</sup> In this case, Livingston, J., used the term "domestic" to designate the judgments of other States of the U. S., 1 Caines, 468, and to distinguish them from judgments obtained in foreign states. The reader will remember the use of the terms *domestic* and *foreign* in ch. xiii. and xx. of this work.



to the record which was required by the provision itself. But whether either of these judges intended to recognize in this that legal operation which Kent and Radcliff had supposed to be essential to support the doctrine of the conclusiveness of the judgment, or, on the contrary, to distinguish effect, as evidence, from legal operation, is not very clear. In the later cases they seem to have been understood as making this distinction, and not as referring the realization of the right and obligation to the Constitution and statute.

§ 613. So in *Bartlett v. Knight* (1805), 1 Mass. 401,<sup>1</sup> such judgment was unanimously held *prima facie* evidence only. Sedgwick, J., admitted that Congress might, under the provision, have given them an effect which would have made them conclusive evidence; though it does not appear whether, like Radcliff and Kent in *Hitchcock v. Aiken*, he held that, before admitting it as conclusive, it must be supposed to have received legal operation.<sup>2</sup>

§ 614. In *Roger v. Coleman* (1810), Hardin's Ky. R., 415:—Judge Trimble, supporting the conclusiveness of the judgment, seems to limit the effect produced by the provision and the statute to an effect as evidence.<sup>3</sup>

<sup>1</sup> In reporter's note on p. 410, it is said that in *Noble v. Goll*, occurring in Massachusetts several years earlier, it had been held that "the judgments of the courts of record in the several States were placed, in all respects, upon the same footing with our domestic judgments."

<sup>2</sup> Sedgwick, J., 1 Mass. 409:—"It will appear that as well the effect of records, &c., as their mode of authentication, is by the Constitution within the power of Congress."

In *Curtis v. Gibbs* (1805), Pennington's R. 399, N. J., Judge Pennington, in an opinion apparently extrajudicial on this point, maintaining the conclusiveness of the judgment, referred the term "effect" to the "acts," &c.; yet said, p. 404, "It will not, I trust, be contended that by the effect is meant a legal coercive power. The effect is to depend on the credit given them," &c.

<sup>3</sup> "The late learned and lamented Judge Trimble," said Baldwin, J., in 4 Peters, 470. The reader will be struck by the words italicised in the citation, as indicating how little the questions respecting slavery had then attracted judicial attention. Hardin, p. 415:—"We cannot, however, give into such a construction of the Constitution of the United States, when using the expressions, 'full faith and credit,' as would assign to the judgment of a sister State no greater credibility nor claim from us any greater faith than the language, precepts, or commands thereof were orthodox, according to the immutable principles of justice, than if it were the sentence of a foreign, heterogeneous government. Such a construction would make that part of the Cons. a mere senseless, dumb article. With a guarantee of a republican form of government as given by that Cons., with one common declaration as to the rights of man in society, with homogeneous sentiments of general jurisprudence, and that similarity of trial and of the evidence admissible on that trial which prevails in the States, all of whom have drawn their notions of justice from the



§ 615. In *Green v. Sarmiento* (1810), 3 Wash. C. C. R., 17, and *S. C. 1 Peters, C. C., 74*, and in *Field v. Gibbs*, *ibid.* 157, Judge Washington, in the Circuit court, held the record conclusive evidence "not only of the existence of the judgment, *but of the right which it has decided.*" (1 *Peters, C. C., 82.*) He referred the "effect thereof" to the "acts" (*ib.* 78, 80); and, from the whole opinion, he seems to have distinguished such effect as something beyond that faith and credit which he thought already fixed by the Constitution itself.<sup>1</sup> He held that Congress, having power to do so, had intended "to declare the force and effect to be given to the records and judicial proceedings when so authenticated." But the force and effect which he considered hereby given he distinguished to be an effect as evidence, different from legal operation; making the distinction plainer by asserting a power in Congress to go beyond the present Act in declaring the effect of judgments of one State in other States, and to make them directly operative on private persons.<sup>2</sup>

*same common source*, there can exist no just cause of jealousy against these different tribunals. To give such faith and credit to the records abroad as they would have at home, is certainly giving them full faith and credit. The Cons. of the U. S. can require no more, and the law of Congress on the subject (whether we regard the effect of the authentication by which the credit and faith is to be demanded or the effect of the contents of the record) can mean no more or less."

<sup>1</sup> Though he observes, 1 *Peters, C. C., 82*, that, in the State of its origin, the record is "evidence and conclusive evidence, not only of the existence of the judgment, *but of the right which has been decided.* If you, then, deny to such judgment the force and effect given to it by the laws" of the State of origin, "you deprive it of the *same faith and credit* which the same laws attribute to it; and, in truth, the latter expressions, as used in the act of Congress, are synonymous with the former."

<sup>2</sup> Answering the objection that if the judgment is to have such effect in the other States that it had in the State of origin "it would create a lien on lands, or that an execution might issue from the court wherein it had been rendered in those other States, or that a *scire facias* would lie," the Judge observes, p. 82 of the report, "These, if they be evils, are altogether imaginary. The judgment itself has no extra-territorial force, the laws of the State" of its origin "can give it none, nor does it obtain it from the act of Congress. The courts of the other States are enjoined to give it such faith and credit as it is entitled to in the State" of its origin. "If it be conclusive evidence of the rights it establishes in the court of" that State, "it is conclusive here; and this is all that the act of Congress requires. There, however, is no doubt in my mind but that Congress may give to the judgments of one State all the effect which it is complained may follow the rule laid down by the court; and I confess that I can see no good reason why such an effect may not in part be given. Why ought not an execution to issue upon a judgment rendered in one State against the person and effects of the defendant found in any other? It is unnecessary, however, to moot the policy of the measure, which must rest with Congress in its wisdom to adopt, if it should seem right to that body to do so."

§ 616. In *Bissell v. Briggs* (1813), 9 Mass., 467, the majority held such judgment conclusive evidence in a certain class of cases, though excluding judgments in cases like that in which the judgment sued on was given.<sup>1</sup> Sewall, J., dissented, adhering to the earlier case, *Bartlett v. Knight*, and appeared to hold, with Radcliff and Kent, in *Hitchcock v. Aiken*, that conclusiveness included legal operation and effect, which was not incidental to giving full faith and credit to the record, and had not been prescribed by the statute.<sup>2</sup> Parsons, C. J., giving the opinion of the majority, seems to exclude the idea that, in admitting the conclusiveness of the judgment as evidence, any legal operation or effect on the rights of parties within the forum is implied to have been caused by the Constitution, or the law of Congress. He referred the words "effect thereof" to the manner of proof, and not to the "acts, records, and judicial proceedings."<sup>3</sup> Sedgwick and Thatcher, JJ., who, with Sewall,

<sup>1</sup> This case was decided without reference to the contemporary case, *Mills v. Duryee*, in the Supreme Court of the United States.

<sup>2</sup> 9 Mass., 472, Sewall, J.:—"Does faith and credit, whether full or determined by the laws and usages of the State from whence the record is authenticated, import legal effect and operation? This import, though professedly stated, I believe, to be the true construction, was practically denied in all the cases which occurred where the same words used in the Articles of Confederation were brought in question."

<sup>3</sup> 9 Mass., 467. Parsons, C. J., noticing the objection that "the provision in the Federal Constitution has no force until Congress declare the effect of judgments rendered in any of the United States, and that Congress has made no such declaration," says: "But this objection is founded on an erroneous construction of the Constitution,—for, by the express words of the Constitution, all the effect is given to judgments rendered in any of the United States which they can have, by securing to them full faith and credit, so that they cannot be contradicted, or the truth of them denied. And the future effect which Congress was to give relates to the authentication, the mode of which is to be prescribed. In this sense Congress understood the subject; for, after providing a mode of authentication, it is enacted that judgments so authenticated shall have the same faith and credit given to them in every State as they have in the State from which they were taken. But neither our own statute [referring to act of Mass., 1795, c. 61], nor the Federal Constitution, nor the act of Congress, had any intention of enlarging, restraining, or in any manner operating upon the jurisdiction of the Legislatures, or of the courts of any of the United States. The jurisdiction remains as it was before; and the public acts, records, and judicial proceedings contemplated, and to which full faith and credit are to be given, are such as were within the jurisdiction of the State whence they shall be taken." And on p. 469, "From this reason it is manifest that judgments rendered in any other of the United States are not, when produced here as the foundation of actions, to be considered as foreign judgments, the merits of which are to be inquired into, as well as the jurisdiction of the courts rendering them. Neither are they to be considered as domestic judgments rendered in our courts of record, because the jurisdiction of the courts rendering them is a subject of inquiry. But such judgments, so far as the court rendering them had jurisdiction, are to have in our courts full faith and



J., had decided *Bartlett v. Knight*, were not present at the argument or the decision of this case. Parker, J., concurred in the opinion of the Chief Justice.<sup>1</sup>

§ 617. In *Mills v. Duryee* (1813), 7 Cranch, 481, Jones, counsel for the party proffering the judgment, is reported to have said, "It is admitted that a record authenticated pursuant to the act of Congress is to have the *effect of evidence only*; but it is evidence of the *highest nature*, viz., *record evidence*." The opinion of the court, delivered by Mr. Justice Story, has since always been referred to as the leading authority; and, though somewhat ambiguous on this point, it seems to have been understood as supporting the doctrine that the judgment can be held absolutely conclusive evidence, and yet be said to have an effect as evidence only, distinguishable from operation of law determining rights and obligations of private persons.<sup>2</sup>

credit. They may, therefore, be declared on as evidences of debt or promises; and on the general issue the jurisdiction of the court rendering them is put in issue, but not the merits of the judgments."

<sup>1</sup> But in some points this does not agree with the opinion of Parker, C. J., in *Warren v. Flagg* (1825), 2 Pick., 449:—"It is perfectly clear that by this article nothing was settled but that the acts, &c., authenticated as Congress should prescribe, were to be received as conclusive evidence of the doings of the tribunals in which the acts passed. And it is equally clear that the effect of such acts was to be determined by Congress. The act of Congress passed in 1790 prescribes the mode of authentication; but, we should say, except for the decision of the Supreme Court of the United States [*Mills v. Duryee*], has not determined the effect: for it only provides, in the words of the Constitution, for the 'faith and credit' to be given to acts, &c., so authenticated,—leaving the effect uncertain, as it was by the Constitution."

<sup>2</sup> 7 Cranch, 484, Story, J.:—"It is argued that the act provides only for the admission of such records as *evidence*, but does not declare the *effect* of such evidence when admitted. This argument cannot be supported. The act declares that the record, duly authenticated, shall have such faith and credit as it had in the State court from whence it is taken. If, in such court, it has the faith and credit of evidence of the highest nature, viz., *record evidence*, it must have the same faith and credit in every other court. Congress have, therefore, declared the *effect* of the record, by declaring what faith and credit shall be given to it." And, p. 485, "Were the construction contended for by the plaintiff in error to prevail, that judgments of the State courts ought to be considered *prima facie* evidence only, this clause in the Constitution would be utterly unimportant and illusory. The common law would give such judgments precisely the same effect. It is manifest, however, that the Constitution contemplated a power in Congress to give conclusive effect to such judgments; and we can perceive no rational interpretation of the act of Congress, unless it declares a judgment conclusive when a court of the particular State where it is rendered would pronounce the same decision."

Here, it will be noticed, Judge Story regards the conclusiveness of the judgment as that effect which Congress was empowered to give, and one not incidental to giving full faith and credit to the judgment when proved. In his Comm., §§ 1312, 1313, Judge Story noticed the variety of judicial opinions as to the



Mr. Justice Johnson, dissenting, opposed the doctrine which allows no plea other than *nul tiel record*, and urged the objection that judgments rendered without jurisdiction would necessarily, under such a rule of pleading, be held conclusive. But his argument that such judgments should not be held conclusive because contrary to natural justice, seems competent to overthrow, in any case, the doctrine of the conclusiveness of the record, as evidence to determine the merits of the subject-matter of the judgment.<sup>1</sup>

Marshall, C. J., affirmed the doctrine of the court in this case in *Hampton v. McConnell* (1818), 3 Wheaton, 234, and in *Mayhew v. Thatcher* (1821), 6 Wheaton, 129, intimating in the

relative force of the provision itself, and of the statute, arising from differences as to the syntax of the words "and the effect thereof," saying that the opinion which connects them with the proof, or authentication, and which attributes the conclusiveness of the judgment to the first clause of the provision, "seems now to be considered the sounder interpretation. But it is not, practically speaking, of much importance which interpretation prevails, since each admits the competency of Congress to declare the effect of judgments, when duly authenticated; so, always, that full faith and credit are given to them, and Congress, by their legislation, have already carried into operation the objects of the clause." Then, referring to *Mills v. Duryee, &c.*, he adds:—"It is, therefore, put upon the same footing as a domestic judgment. But this does not prevent an inquiry into the jurisdiction of the court, in which the original judgment was given, to pronounce it, or the right of the State itself to exercise authority over the persons or the subject-matter. The Constitution did not mean to confer a new power or jurisdiction, but simply to regulate the effect of the acknowledged jurisdiction over persons and things within the territory." The meaning of the concluding sentence is not very obvious. It is, however, quoted by Judge Wayne, in *McEmoye v. Cohens*, 13 Peters, 327, as having been "well said."

In *Conflict of Laws*, § 609, Story says:—"The Constitution did not mean to confer any new power upon the States, but simply to regulate the effect of their acknowledged jurisdiction over persons and things within their territory. It did not make the judgments of other States domestic judgments to all intents and purposes, but only gave a general validity, faith, and credit to them as evidence."

<sup>1</sup> 7 Cranch, 486, Johnson, J.:—"Now if, in this action, *nul tiel record* must necessarily be pleaded, it would be difficult to find a method by which the enforcing of such a judgment could be avoided. Instead of promoting, then, the object of the Constitution, by removing all cause for State jealousies, nothing could tend more to enforce them than enforcing such a judgment. There are certain eternal principles of justice which never ought to be dispensed with, and which courts of justice never can dispense with but when compelled by positive statutes. One of those is, that jurisdiction cannot be justly exercised by a State over property not within the reach of its process, or over persons not subjected to their jurisdiction by being found within their limits. But if the States are at liberty to pass the most absurd laws on this subject, and we admit of a course of pleading which puts it out of our power to prevent the execution of judgments obtained under those laws, certainly an effect will be given to that Article in the Constitution in direct hostility with the object of it." \* \* \* "I am unwilling to be precluded, by a technical nicety, from exercising our judgment at all upon such cases."

last case an exception as to judgments rendered without personal jurisdiction. The discrimination of the effect judicially ascribed to the Constitution and law of Congress, in being an effect as evidence only, distinguishable from legal determination of the rights and obligations in support of which the judgment might be produced in the forum, was further illustrated by the cases in the Supreme Court of the United States, *McEmoye v. Cohen* (1839), 13 Peters, 312,<sup>1</sup> and *Bank of the State of Alabama v. Dalton* (1850), 9 Howard,<sup>2</sup> 522. In these the validity of a statutory limitation of the time for bringing suit in the forum upon judgments obtained in other States was sustained, on the ground that the remedy upon the judgment was entirely dependent upon the local law of the State wherein the action was brought, and in no wise affected either by the law of the State in which it had been obtained, or by the statute of Congress.<sup>3</sup>

In *D'Arcy v. Ketchum* (1850), 11 Howard, 175, the doctrine of the court is repeated, with the rejection of judgments rendered against parties not personally within the jurisdiction, or not appearing by attorney.<sup>4</sup>

<sup>1</sup> 13 Peters, 324, Op. of the court, by Wayne, J.:—"But the point might have been shortly dismissed with this sage declaration, that there is no direct constitutional inhibition upon the States, nor any clause in the Constitution from which it can be even plausibly inferred, that the States may not legislate upon the remedy in suits upon the judgments of other States, exclusive of all interference with their merits." This intimation that the merits of a legal claim may be unquestioned where the law-giver refuses a remedy, would have been a better illustration for Senator Benjamin's argument, noticed in the first volume, p. 582, than any there adduced by him.

<sup>2</sup> 9 Howard, 528. Op. of the court, by Catron, J.:—"As to what further 'effect' Congress may give to judgments rendered in one State and sued in another does not belong to this inquiry: we have to deal with the law as we find it, and not with the extent of the power Congress may have to legislate farther in this respect. That the legislation of Congress, so far as it has gone, does not prevent a State from passing acts of limitation to bar suits on judgments rendered in another State, is the settled doctrine of this court," &c. In the Supreme Court of Tennessee, *Hunt v. Lyle*, Catron, Ch. J., said:—"Congress having declared the force and effect of judgments and decrees in sister States to be the same as in the States where they were rendered, it is our duty to execute this decree rendered in Virginia, just as there it would have been executed, had," &c.

<sup>3</sup> Also *Hubbell v. Cowdry* (1809), 5 Johns, 132; *Jones' admr. v. Hook's admr.* (1824), 2 Randolph, Va. 303; *Cameron v. Murtz* (1827), 4 McCord, 278; but *contra*, *Morton v. Naylor* (1833), 1 Hill's S. C. 439.

<sup>4</sup> Catron, J., delivering Op. of the court, concludes:—"We cannot bring our minds to doubt that the act of 1790 does not operate on or give additional force to the judgment under consideration." But how, under the decisions, could this be well predicated of the effect of the act, in any case, if the effect given is only effect as evidence?



§ 618. "A case arises within the meaning of the Constitution whenever any question respecting the Constitution, laws, or treaties of the United States has assumed such a form that the judicial power is capable of acting upon it. That power is capable of acting only when the subject is submitted to it by a party who asserts his rights in the form prescribed by law. It then becomes a case." Now the rights which may thus be asserted and denied in an action, the formal application of remedial justice, must, it would seem, be substantive or primary rights, as distinguished from secondary, remedial, or adjective rights;<sup>1</sup> and the secondary, remedial, or adjective right to produce certain evidence, in support of an action, cannot itself be the subject of an action. If the admitted conclusiveness of the judgment presupposes operation of the Constitution and statute of Congress on the right and obligation which the judgment is adduced to prove, the assertion of that right is a case arising under the Constitution and law of the United States, and within the judicial power of the United States extending to cases under certain laws. But by limiting the "effect" declared by Congress to an effect as evidence, the right and obligation sought to be enforced in the action are left dependent on local or State law, and therefore not within the judicial power of the national government, except as they may be controverted in cases arising between certain persons.

If no decision of a State court against a claim founded on a judgment rendered in another State had ever been brought up to the Supreme Court of the United States as a case "arising under the Constitution and laws of the United States," that circumstance might afford a negative argument that the conclusiveness of the judgment under the statute of Congress is regarded as entirely distinct from its legal operation. I have not been able to find any case of this kind in the reports of the Supreme Court.<sup>2</sup> But by the Supreme Court of Penn-

<sup>1</sup> *Osborne v. U. S. Bank*, 9 Wheaton, 819; 1 Curtis' Comm. § 1.

<sup>2</sup> 1 Starkie's Ev. 1:—"Every system of municipal law consists of *substantive* and *adjective* provisions. Substantive, which define primary rights and duties; adjective, which provide means for preventing or remedying the violation of substantive provisions."

<sup>3</sup> The cases cited from these reports were all on appeals from the U. S. Circuit or District courts.



sylvania it is said, in a recent suit on such a judgment (1856), *State of Ohio v. Hinchman*, 27 Penn. (3 Carey), 483, "A judgment of this court adverse to the rights arising out of the federal Constitution and legislation would be reviewable in the Supreme Court of the United States."<sup>1</sup>

The numerous other cases, in the State courts, later than *Mills v. Duryee*, and following it as the leading authority, though with the limitations given in the rule hereinbefore stated (p. 246), do not throw much light on the point under consideration. The weight of judicial opinion seems to support the doctrine that legal operation or effect on the substantive rights of the parties is not involved in the received doctrine of the conclusiveness of judgments under the statute.

§ 619. From the nature of the judicial function there can be no authoritative judicial opinion as to any further effect which Congress may hereafter prescribe.<sup>2</sup>

<sup>1</sup> The same doctrine is held in *Rogers v. Burns*, 27 Penn. (1856) (3 Carey), 527. It had been before laid down by Lewis, J., in the court below. See *Baxley v. Linah* (1851), 16 Penn. (4 Harris), 243. For the application of the doctrine in these cases, see the note *ante*, p. 246, n. 3.

<sup>2</sup> Besides those already noted, the principal authorities are 15 Johns. 143; 19 ib. 161; 4 Cowen, 292, 523; 8 ib. 311; 5 Wend. 155; 6 ib. 447; 17 Mass. 543; 6 Pick. 244; 13 ib. 53; 4 Metcalf, 333; 9 S. & R. 252; 10 ib. 240; 12 ib. 203; 7 Watts & Serg. 447; 4 Munf. 241; 1 N. H. 242; 4 Conn. 380; 3 Hawks, 401; 1 Hammond, 124; 1 Blackf. Ind. 109; 2 Verm. 263; 4 ib. 67; 2 Leigh, 172; 2 Yerger, 376, 484; 8 ib. 142; 1 Green, N. J. 70; 5 Gill & Johns. 507; 1 Hill's So. C. 439; 18 Geo. 725; 2 McLean, C. C. 511; 2 Woodbury & Minot, 4; 2 Paine's C. C. 507. Similar cases under the Articles of Confederation are 1 Dallas, 188, 261; Kirby, 119. The questions arising under the provision of the Constitution are, with the cases, very elaborately examined in notes to the American editions of Phillips on Evidence, Part II. ch. I. § 6, and in App. to Am. Leading Cases, ed. 1855, note to *McEmoye v. Cohen*.

<sup>3</sup> Judicial opinion can be expressed only in cases arising out of some power claimed (*ante*, vol. I, p. 429, n. 3). While the decision of the Supreme Court of the U. S. is admitted to be final as between the parties in such cases, it is, for all the rest of the world, only an element for juristical deduction (*ante*, vol. I, p. 526, n. 3). But the action of the other departments of the national government cannot be prospectively limited by any number of such decisions (*ante*, p. 245, n.). President Lincoln, in his Inaugural, March 4, 1861, has said:—"I do not forget the position assumed by some, that constitutional questions are to be decided by the Supreme Court, nor do I deny that such decisions must be binding in any case upon the parties to a suit, as to the object of that suit, while they are also entitled to very high respect and consideration in all parallel cases by all other departments of the government; and, while it is obviously possible that such decision may be erroneous in any given case, still the evil effect following it being limited to that particular case—with the chance that it may be overruled, and never become a precedent for other cases—can better be borne than could the evils of a different practice. At the same time the candid citizen must confess that, if the

If, as is held by the smaller number of judicial opinions, the conclusiveness of judgments coming within the received rule is an effect caused by the law of Congress, and not one incidental to giving full faith and credit as required by the Constitution, it seems difficult to say why the power should be held to be limited to prescribing an effect *as evidence*, and not to extend to giving the judgment operation or legal effect on the relations of private persons.

So it appears that the judges who support the conclusiveness of the judgment on this reading of the provision are generally those who also intimate that Congress may go farther and prescribe a greater effect. On the other hand, the opinion that no greater effect, than effect as evidence, can ever be attributed to the judgment, when proved, seems connected with the doctrine held by the greater number of judges, that the conclusiveness of the judgment is incidental to their receiving full faith and credit as provided by the first clause of the provision. Some judges may have regarded legal operation or effect as involved in the giving full faith and credit; but the terms have been generally considered peculiarly appropriate to designate the reception of the record as evidence, distinct from any effect on the substantive rights of the parties.

§ 620. It is probable that Mr. Madison, who was prominent in giving the provision its present expression, always understood the effect spoken of to be the legal operation of the public acts, &c., and as meaning far more than effect as evidence merely. From his language in the *Federalist*,<sup>1</sup> whose au-

policy of the government upon the vital questions affecting the whole people is to be irrevocably fixed by the decisions of the Supreme Court, the instant they are made in ordinary litigation between parties in personal actions, the people will have ceased to be their own rulers, having to that extent practically resigned their government into the hands of that eminent tribunal. Nor is there in this view any assault upon the court or the judges. It is a duty from which they may not shrink to decide cases properly brought before them, and it is no fault of theirs if others seek to turn their decisions to political purposes."

<sup>1</sup> The *Federalist*, No. 42:—"The power of prescribing, by general laws, the manner in which the public acts, records, and judicial proceedings of each State shall be proved, and the effect they shall have in other States, is an evident and valuable improvement on the clause relating to this subject in the Articles of Confederation. The meaning of the latter is extremely indeterminate and can be of little importance under any interpretation which it will bear. The power here established may be rendered a very convenient instrument of justice, and be particularly beneficial on the borders of contiguous States, where the effects liable to



thority, as contemporary exposition, has always been allowed, it is evident that he attributed to this provision a vastly greater importance than could have belonged to the provision in the Articles of Confederation, and supposed that by it some indefinite but highly energetic power had been given to Congress. But the question is, whether the nation which adopted the Constitution took the same view<sup>1</sup> of the new clause.

§ 621. In determining the force of written enactments, the words used must be interpreted with reference to the circumstances under which they were promulgated. From these, too, the reason or motive of the author of the rule is to be known, if it may be known independently of the enactments themselves.<sup>2</sup> Among these circumstances is the pre-existing law and what would have continued to be law in reference to similar objects if the enactment had not been introduced.<sup>3</sup>

justice may be suddenly and secretly translated, in any stage of the process, within a foreign jurisdiction."

No great importance seems to have been attached to the clause in the Convention. From the observations which have been reported, it is clear that, whatever power in respect to judgments may have been intended, those who spoke on the subject did not mean to give a power of extending the statutes of the States. See remarks of Madison and Randolph, Aug. 29, and of Mason, Wilson, and Randolph, Sept. 3, in the Journal of the Convention (Madison Papers, 5 Elliot Debates). In the Virginia Convention, June 23, 1788, Mr. Mason—"The latter part of this clause, Sir, I confess I do not understand—*Full faith and credit to be given to all acts*; and how far it may be proper that Congress shall declare the effects, I cannot clearly see into." Mr. Madison—"It appears that this is a clause which is absolutely necessary. I never heard any objection to this clause before, and have not employed a thought on the subject (3 Elliot's Deb. 584). The clause was substituted in Convention, Sept. 3, 1787, for "And the Legislature shall, by general laws, prescribe the manner in which such acts, records, and [judicial] proceedings shall be proved, and the effect which judgments obtained in one State shall have in another" (Journal, Sept. 1). Assuming that legal operation beyond effect as evidence, was here intended, it does not follow that the word was to have the same meaning in the clause which was adopted. Some of those whose observations are reported may have proposed to give Congress power to execute judgments (see in Madison Papers observations of Madison and others, Aug. 29); but the majority may not have intended such a grant of power. If the sense of the Convention was expressed by the reported remarks against a power to extend State laws, it is as fair to infer that, in adopting the present reading in room of that above quoted, the Convention intended to preclude even judgments from receiving legal effect, as it is to conclude that they intended making the legal operation of public acts, records, and judicial proceedings all equally dependent on Congress. (Compare the arguments of Cobb on Slavery, p. 190; and 2 Curtis' Hist. of Const. 449, note.) The dangers to which this kind of interpretation is liable, are well stated in Story's Comm., §§ 406, 407.

<sup>1</sup> Story's Comm., §§ 406, 407.

<sup>2</sup> Lieber's Hermeneutics, pp. 121-128.

<sup>3</sup> *Ante*, pp. 230-241. Heydon's Case, 3 Rep. 7. 1 Bl. Com. 87. Sedgwick, and Stat. Const. Law, 235. Story's Comm., § 405.



It is superfluous to show that in the absence of this provision every effect which the acts, records, and judicial proceedings of one State, or which the manner of proving them could have in the courts of other States, would have been determined by the common law of the forum, including whatever might be applicable in that body of rules which is judicially known as international private law, until changed by local legislation.<sup>1</sup>

By this customary law two questions would have to be determined: 1. How such acts, &c., may be authenticated. 2. How far they may operate in the forum to determine rights and obligations of private persons.<sup>2</sup>

Now, since the Constitution speaks of "effect" after having given power to prescribe the manner of proof, it would seem that the effect intended was something different from the authentication, and that it must be operative on the rights and obligations of persons.

But then the circumstance is to be noticed, that the whole grant of power to Congress is preceded by the requisition of faith and credit for these acts, &c., and that a similar requisition was already existing in the Articles of Confederation. It is evident that, if the constitutional provision had, like its prototype, been limited to this requisition, the manner of proving such acts, &c., under the customary law in this respect, might vary greatly in the different States.<sup>3</sup> For, as judicial tribunals are not cognizant of the laws of foreign jurisdictions, the proof of their public acts of every kind must be made under the local customary method of proving matters of fact. There might obviously then occur, in the different States, such a variety of practice in this respect as would amount to an unequal giving of faith and credit.

The manner of proof, and the effect of the manner of proof (which reading seems most general),<sup>4</sup> are instrumentalities

<sup>1</sup> Story's Comm. § 1304. In the ordinary phrase, this recognition of foreign judgments is attributed to the *comitas gentium*. See *Ellenborough*, in *Alves v. Bunbury*, 4 Camp. 30.

<sup>2</sup> Story's Comm. §§ 1304, 1305.

<sup>3</sup> Story's Comm. §§ 1304, 1311, and cases.

<sup>4</sup> *Ante*, p. 247, n. 4.

for causing faith and credit. Since, therefore, *effect* is mentioned, for the first time, when Congress is empowered to prescribe the manner of proof, it seems quite as natural to infer that the whole power given is subordinate to the object of the first clause—the giving faith and credit to the written evidences of the juridical action of the States—as to infer that it was intended to produce an effect greater than any incidental to their receiving full faith and credit.

§ 622. In the corresponding clause in the Articles of Confederation, the acts of “courts and magistrates” of the States are, with their records and judicial proceedings, the subject spoken of.<sup>1</sup>

The constitutional provision relates to “the public acts,” &c., of the States themselves. The judgments of its courts are, in a sense, acts of the State itself, but there can be no doubt that the legislative acts of the States are included within the meaning of the term,<sup>2</sup> and the clause has been so understood by Congress and the judiciary. The act of 1790 indicates how the legislative acts of the States shall be authenticated, but no mention is made of any effect which they may have, or of the faith and credit to be given to them. If the conclusiveness of judgments is caused by the law of Congress, the effect implied in such conclusiveness, whatever that may be, cannot be supposed to belong to a State statute under the existing law of Congress. But if, as held in most of the cases,

<sup>1</sup> Art. IV., the last paragraph:—“Full faith and credit shall be given in each of these States to the records, acts, and judicial proceedings of the courts and magistrates of every other State.”

<sup>2</sup> Before adopting its actual provisions, the framers of the Constitution considered and rejected others relating to the same general objects, and more or less resembling the former in their verbal composition. If these rejected propositions or any rejected terms or phrases may be referred to as indicating the intention of the authors of the actual phraseology, it is because these propositions and phrases show what the framers of the Constitution did *not* intend to say. The value of the debates in the Convention and in the ratifying State conventions, as showing the *usus loquendi* of the time and as contemporary exposition of the adopted phraseology, is a distinct thing. But it is not uncommon to find interpretations in which the rejected phraseology is made to control that which was substituted for it. Yet where a more specific term has been rejected for one more general, the former may well be supposed to have been intended within the latter. The clause under consideration was substituted in the Convention, Sept. 1st and 3d, for the 16th of the articles proposed Aug. 6, 1787, which read:—“Full faith shall be given in each State to the acts of the Legislatures, and to the records and judicial proceedings of the courts and magistrates, of every other State.” See Journal. Madison Papers, 1240, 1448.



the conclusiveness of a judgment, when proved in the manner prescribed, is caused by the constitutional provision and not by the law of Congress, it would seem that a State statute might be held equally conclusive as to any rights and obligations declared by it. No effect or legal operation has, it is believed, ever been claimed for a State statute, when proved in the manner prescribed.<sup>1</sup> But, from the collocation of *acts* with records and judicial proceedings in the Constitution, it would seem that Congress might "prescribe" for a State statute whatever effect it is competent for that body to prescribe for a judgment of such State, and that it might be made as conclusive evidence in other States, as judgments are or can be made, in respect to rights and obligations of persons who are bound by it within the State whose act it is. And if Congress can, in reference to judgments, do more than has been done in making them conclusive as evidence, and can give them additional effect and operation in every State, it seems difficult to say why similar operation and effect may not also be given to the statutes of a State, or to such, at least, as determine the rights and obligations of persons in relations which can, in their nature, continue in other jurisdictions.<sup>2</sup>

When, under customary international private law, the

<sup>1</sup> In 1 *Caines*, 481, Judge Kent, arguing against the conclusiveness of the judgment as evidence, said:—"It is pretty evident that the Constitution meant nothing more by full faith and credit, than what respected the evidence of such proceedings, for the words are applied to public acts as well as to judicial matters." *Earthman v. Jones*, 2 *Yerger*, 486. *Catron, J.*:—"Congress has no power conferred, by the Constitution, to subject one State sovereignty to the legislation of another, nor has the exercise of such a power been attempted by the act of 1790."

<sup>2</sup> The reader may think the consequences of this provision very remotely connected with the subject of this treatise; and, indeed, the writer has been led to devote so much space to its consideration solely by the observations of Mr. Thomas R. R. Cobb, of Georgia, in the first vol., pub. Aug., 1858, of his work on the Law of Negro Slavery, §§ 205-215. Holding, from the dicta in the adjudged cases, that Congress may give an effect to judgments beyond effect as evidence, Mr. Cobb argues that they may give a like effect to the *acts* of the States, which term, as used in the provision, he also assumes to be equivalent to *laws* in the general sense. Under this interpretation, Mr. Cobb urges that Congress may give effect or operation to the laws of the several States which determine *status* in the place of domicile, so far as to maintain those rights of masters, in respect to escaped slaves and slaves brought with them in visiting or passing through the free States, which, in the judgment of Congress and the national judiciary, those States are bound by comity to recognize; having also in the same work endeavored to show that the possession of their slaves by owners in these circumstances, should be recognized in the free States on this principle. The suggestion of this doctrine, though by a private jurist, will show the importance which may attach to the understanding of this provision.



juridical action of a foreign state is produced in evidence to determine rights and obligations in any forum, it is entirely immaterial whether such juridical action was exhibited in written law—statutes or codes—or by the customary unwritten law of the foreign state. To suppose that Congress may give the statutes of one of the several States an effect or operation in the other States, which could not be given to its unwritten common law, seems inconsistent or without apparent reason. For rights and obligations which in one State rest on common law alone may exactly correspond with those which in another have been declared by statute, and in most of the States those which are attributed to common law are far more important than any resting on statute.<sup>1</sup>

But the particular and inferior cannot defeat the general and superior; the exception is not to be made more general than the rule to which it is an exception,<sup>2</sup> and in answer to such an interpretation it must be urged that such a power in Congress to extend the local law of the several States would be an immeasurable limitation of the two most fundamental and general principles of the Constitution. One of these is, that the States are to be mutually independent in the exercise of those powers which have not been granted to the national government; the other, that powers are granted to Congress specifically, or are specific in respect to certain relations. Such a power in Congress would be manifestly indeterminate, and be an indefinite restriction on the exercise by the States of their reserved powers.

Whatever power may have been intended, it is evident that the law resulting from it will form part of the *quasi*-international law of the Union, limiting the States in the exercise of their reserved powers in respect to domestic aliens. But the other sections of this Article have this effect also, and, therefore, like statutes *in pari materia*, they may be infer-

<sup>1</sup> As has been noted above, Mr. Cobb assumes that *public acts* in the provision may include any rule of law.

<sup>2</sup> Sedgwick on Constr. 287. Lieber's Hermeneutics, 168:—"The general and superior prevails over the specific and inferior; no law, therefore, can be construed counter to the fundamental law. If it admits another construction, this must be adopted."

preted by each other. These other sections contain specific limitations of the States in this exercise of these powers, and the expression of these implies the exclusion of an interpretation of this provision, which would authorize a more general *inter*-limitation at the will of Congress. *Expressio unius est exclusio alterius*.

It is no *a priori* assertion to say that such an idea is utterly contrary to the spirit of the Constitution,<sup>1</sup> and the objection applies against attributing to any written evidence of the juridical action of a State, whether public act, record, or judicial proceeding, any legal operation or effect, in the other States, beyond an effect as evidence.

§ 623. The conclusiveness of judgments, coming within the general rule, as to the merits of a claim in distinction from a simple recognition of their genuineness, has been shown to be supported by a great weight of judicial decision.

Yet, notwithstanding the frequency of occasions for judicial exposition of the doctrine, it has not been very clearly shown, in the opinions, upon what principle of interpretation records of judicial proceedings, in the recognized cases of exception, have been excluded from the operation of the Constitution and the statute.

This exclusion may perhaps be founded upon an argument like the following. The provision is either an international compact as between the States, and, therefore, to be interpreted by rules applicable to the explanation of international compacts, in which case the meaning of the terms used is to be ascertained by a standard common to the contracting parties, or it is like a statutory enactment, and its meaning is referable to language before used by the enacting person, the integral people of the United States. In either case, then, a "judi-

<sup>1</sup> Lieber's Pol. Hermen. 177:—"A primary rule suggested by mere common sense, and yet so frequently abandoned, both in religion and politics, and always the more flagrantly so the more men are obliged by the unsoundness of their view to resort to special pleading, is that we ought not to build arguments of weighty importance on trifling grounds, not to hang burdens of great weight on slight pegs; for instance, an argument of the highest national importance upon the casual position of a word. This rule applies to all and every construction, indeed, but it naturally becomes the more important, the more important the <sup>2</sup> in which we have to construe."



cial proceeding," within the meaning of the Constitution, or "a judgment," within the intent of the statute, is not merely whatever any one State may call such. There must be a criterion common to the States, as contracting parties, or as constituting one political person. This cannot be any other than that given by "common law" previously having national or *quasi*-international extent; and by this rule only the decrees of judicial bodies having *jurisdiction*, as that is understood at common law, can be intended in the Constitution, or be affected by the action of Congress.<sup>1</sup> So, in excluding judgments in criminal cases, it may be argued that they are incidental to a local system of discipline.<sup>2</sup>

But, from the language of judges in some cases, it would appear that this exclusion in these instances is attributable to a contrariety between the local law under which the judgment had originally been given and some rule of right comprehended in the local law of the forum of jurisdiction.<sup>3</sup> If this

<sup>1</sup> *Hitchcock v. Aiken*, 1 Caines, 460, Livingston, J.:—"A sentence thus obtained deserves not the name of a judgment." *Aldrich v. Kinney*, 4 Conn. 384. *Roger v. Coleman*, Hardin, 416. *Thurber v. Blackburne*, 1 N. H. 245. *Starbuck v. Murray*, 5 Wendell, 158. *Marcy, J.*:—"For what purpose does the defendant question the jurisdiction of the court? Solely to show that its proceedings and judgments are void, and therefore the supposed record is not a record. \* \* \*

Unless a court has jurisdiction, it can never make a record which imparts absolute verity to the party over whom it has usurped jurisdiction." See also *Earthman v. Jones*, 2 Yerger, 484. See analogous reasoning in deciding what acts or statutes may be aided by the law of Congress, where, in 9 Mass. 468, Parsons, C. J., says of another case:—"The court were of opinion that the full faith and credit that were to be given to public acts of the Legislature were confined to acts which a Legislature had lawful authority to pass, and that it was not within the jurisdiction of the Legislature of Massachusetts to license the sale of land in New Hampshire."

<sup>2</sup> 1 Greenleaf's Ev. § 376.

<sup>3</sup> Thus, in *Bissell v. Briggs*, 9 Mass. 472, Judge Sewell dissented, holding that inquiry into the merits was not precluded, and said:—"Other suggestions might be made of cases arising under laws esteemed to have been enacted against public faith, or *contra bonos mores*; or judgments recovered against positive regulations within the State to which they are brought to be enforced. Such, for instance, would be judgments upon usurious or gaming contracts, illegal and void where made, but which may happen to be recovered where no such restraints are recognized." In *Kilburn v. Woodworth*, 5 Johns. 40, the court say:—"To bind a defendant personally by a judgment when he was never personally summoned, or had notice of the proceeding, would be contrary to the first principles of justice." In *Borden v. Fitch*, 15 Johns. 143, Thompson, C. J.:—"Although I have a very strong conviction that the Constitution of the United States and law of Congress cannot be applied to a judgment which we consider void upon the first principles of justice, so as to make it conclusive upon it," &c., doubting whether a contrary doctrine was intended by *Mills v. Duryee*. See also the lan-



be the principle, it is difficult to see why its effect should be limited to these instances, and why it will not apply in any cases where the judgment has been pronounced under a law which, in the forum of jurisdiction, is held contrary to natural justice. But this would be nothing else than the doctrine that no judgment is in these cases more than *prima facie* evidence. It seems not improbable that in cases hereafter arising, wherein great differences of opinion as to the ethical character of the subject-matter of the judgment may be ascribed to the political peoples of the State in which it originates, and that wherein it is produced in evidence, these views may be urged in modification of the rule now received.<sup>1</sup>

From the language of some decisions it would seem that the judgments which are made conclusive evidence under the statute are discriminated from others by some doctrine of private international law, including the ordinary idea of international comity as something to be administered by the courts of law, intensified and amplified by a patriotic contemplation of the political relations of the States towards each other.<sup>2</sup>

guage of Mr. Justice Johnson, in *Mills v. Duryee*, *ante*, p. 254, note, and Judge Parker's citation of it in *Hall v. Williams*, 6 Pick. 242; also, Gibbon, Ch. J., in *Steel v. Smith*, 7 Watts & Serg. 450. Some authorities speak in a vague way of impeaching judgments from other States, by showing that they were fraudulently obtained. But these cannot be sustained in connection with the general rule, except as they apply to judgments obtained by a fraudulent simulation of jurisdiction. See *McRae v. Mattoon*, 13 Pick. 53, and Cowen and Hill's note to *Phillips on Ev.*

<sup>1</sup> Cases of the litigation of rights and obligations arising out of the existence of slavery will readily occur to the reader.

<sup>2</sup> In *Bissell v. Briggs*, 9 Mass. 478, Sewall, J., alluding to this, says:—"The comity we are disposed to extend on these occasions will not be reciprocated therefore in all the States. \* \* \* In adhering to the common law, we should have a system of rules which will be uniformly administered and which afford a sufficient comity for every purpose of equal and exact justice in cases where the rights of individuals are principally affected." See similar expressions, *ib.* p. 475; and the allusion to comity in *Borden v. Fitch*, 15 Johns. 143, by Thompson, Ch. J.

This interpretation of the constitutional provision according to the supposed requirements of comity, is a different thing from ascribing the provision to a spirit of comity, as by Sedgwick, J., in *Bartlett v. Knight*, 1 Mass. 409:—"As by our union a greater degree of comity is due to the proceedings of our sister States than to those of States which are in every respect foreign, the Constitution has provided," &c. But then these provisions which may have been dictated by comity, are not afterwards to be interpreted according to whatever a judge may suppose comity to require. In *Baxley v. Linah*, 4 Harris, 16 Penn. 249, the received doctrine is attributed to "a regard to constitutional law, to judicial uniformity and State harmony." A judge may find the measure of State harmony in constitutional law, but cannot find the measure of constitutional law in what he may consider State harmony. Catron, J., in *D'Arcy v. Ketchum*, 11 Howard, 175,

In this connection it would be necessary to know whether this comity is, in each State, whatever the local sovereignty may allow to be such, or whether there is some general standard of comity for all the States, and one identified in authority with the *quasi*-international law.<sup>1</sup>

§ 624. In determining the force of this provision, an inquiry arises as to the extent of the word *State*.

It has been seen in the cases cited from the reports of the United States courts, that judgments of State courts have been supposed to have in the courts of the United States the like effect which, by the force of this provision and the acts of Congress, they can have in the courts of the several States.

But the judgments of United States Circuit and District courts are not supposed to have, either in the State courts or in other United States courts, any effect attributable to this provision.<sup>2</sup>

A greater difference of opinion has arisen on the question whether the District of Columbia and the Territories of the

seems inclined to do this, saying:—"In construing the act of 1790, the law as it stood when the act was passed must enter into that construction; so that the existing defect in the old law may be seen and its remedy by the act of Congress comprehended. Now, it was most reasonable, on general principles of comity and justice, that among States and their citizens united as ours are, judgments rendered in one should bind citizens of other States, where defendants had been served with process, or voluntarily made defence."

<sup>1</sup> So Mr. Cobb (*ante*, p. 262, n.) indicates comity as determining what laws of the several States may be made operative in other States under his interpretation of this provision, and assumes that it is competent for the national judiciary, in the last resort, to determine the extent of its requirements. But if there is anything clear in connection with the doctrine of comity, as ordinarily understood in private international law, it certainly is that, within his own jurisdiction, each possessor of sovereign power determines independently what it is that comity requires.

<sup>2</sup> *Pepoon v. Jenkins*, 2 Johns. Cases, 119; *Mason's Adm. v. Lawrason*, 1 Cranch's C. C. R., 190; *Buford v. Hickman*, *Hempstead's C. C. R.*, 232. There are cases in which, without particular reference to this provision, it seems to be held that such judgments should be regarded as domestic judgments in the State courts. See *Barney v. Patterson's Lessee*, 6 Har. & Johns. 182, 202; *St. Albans v. Bush*, 4 Vern. 58; *Rochelle's heirs v. Bowers*, 9 Louisiana, 528. *Contra*, in *Baldwin v. Hale*, 17 Johns. 272, it is held that a circuit court of the U. S. "is to be regarded as a court of another government. Their records, therefore, as to this purpose, are foreign records." Also, *Griswold v. Sedgwick*, 1 Wend. 131.

The judgments of the several U. S. Circuit and District courts are, as between each other, regarded as domestic judgments. But their conclusiveness in such case is not attributed to this provision. *Reed v. Ross*, 1 Bald. C. C. 36; *Montford v. Hunt*, 3 Wash. C. C. 28. The manner of proving a record prescribed by the law of Congress may, however, be adopted by a United States court as appropriate for such judgments. *Tooker v. Thompson*, 3 McLean 94; *Buford v. Wickman*, *Hempstead's C. C. R.* 232; and see 2 Johns. Cases (2d ed.) 119, note.



United States are to be considered *States* in view of this provision. In the second section of the act of 1804, Congress has construed this clause as extending to such District and Territories by declaring that that act and the act to which it is a supplement shall apply as well to the public acts, &c., of the respective Territories of the United States and countries subject to the jurisdiction of the United States as to the public acts, &c., of the several States.

In *Haggin v. Squires* (1811), 2 Bibb's Ky. 334, it was held, that a judgment in one of the courts for the Territory of Louisiana was not such a judgment as became conclusive under the Constitution.<sup>1</sup>

In *Seton v. Hanham* (1832), R. M. Charlton, 374. By Law, Judge:—"After the most careful examination of this subject which I am capable of giving to it, I have come to the conviction that the term *State*, when used in the Constitution of the United States, is confined to a member of the American compact; that it does not embrace a Territory of the United States; and that, consequently, Congress had no authority under the Constitution to pass the act of March, 1804, extending the provisions of the act of 1790 to the Territories of the United States, so as to prescribe the mode of proof, or the effect to be given to a judgment of a court of a *Territory* in the courts of a *State* of the Union. So much of the act of March, 1804, is, therefore, held to be unconstitutional and inoperative upon the courts of a State. The States possess the right to legislate upon this subject."

In *Hughes v. Davis* (1855), 8 Maryland, 271, on demurrer to *nil debet*, pleaded in suit on a judgment from the District of Columbia, Le Grand, Ch. J., delivering the opinion of the court, said:—"The necessity of such an enactment as that of 1804 must be conceded by all; and inasmuch as it has, so far as we are informed, been treated ever since its passage as a constitutional exercise of the powers of Congress, we do not feel at liberty to declare it to be otherwise. In the writings of Justice Story and Chancellor Kent on the Constitution,<sup>2</sup> as

<sup>1</sup> The doctrine of *Haggin v. Squires* was noted, merely, in *Price v. Higgins* (1822), 1 Littel, 273.

<sup>2</sup> These writers do not notice the question of the meaning of the term *State* in



well as in a great number of decided cases, the act of 1804 is referred to and has been acted upon without the slightest suggestion from any quarter of its unconstitutionality."

The extent of the word *State* in this provision will hereinafter be further considered, in connection with inquiries into the meaning of the same word in other clauses of the Fourth Article.

§ 625. In this provision a power is expressly given to Congress' whereby, at least after Congress has exercised the power, the provision becomes private law, or acts on private persons, determining the rights and obligations of such persons (so far at least as it determines the adjective or remedial rights of such persons), and thereby becomes identified in authority with national municipal private law. Therefore, though *quasi*-international in its effect, it cannot be open to that question of construction which, in the last chapter, was stated as being material in reference to the international provisions of the Constitution, when the question is of the power of Congress to legislate in view of making them effectual. It is even doubtful whether the States, in the juridical exercise of their reserved powers, are bound to regulate themselves by it,<sup>2</sup> as they are by other grants of power to Congress which are held to involve a corresponding limitation of State powers. But neither legislative action on their part nor any judicial reference to the unwritten law of the States is necessary, in order that this provision should have its intended consequences in affecting the rights and obligations of private persons.

this provision, while they cite, without dispute, the authorities holding that citizens of Territories are not citizens of a State in view of the clause in the third Article defining the extent of the judicial power of the U. S. 1 Kent, p. 384. Story's Comm., § 1694. See *ante*, vol. I., p. 433.

<sup>1</sup> In order to sustain the implied power of Congress to legislate in reference to the objects of other international provisions in this Article, it may be necessary to distinguish a reason for the specific grant of legislative power in respect to the object of this. See, *post*, in Ch. xxvii.

<sup>2</sup> For it is held that the method of proof prescribed by the law of Congress does not exclude other methods, derived from the local law of the State. See 9 Mass., 466; Kean v. Rice, 12 S. & R., 208; Elmore v. Mills, 1 Haywood, 359; State v. Stade, 1 Chipman, 303; Raynham v. Canton, 3 Pick., 296; *Ex parte* Povall, 3 Leigh, 816. But the records of judicial proceedings so proved will not have that conclusiveness which they would have if proved according to the national statute, provided such conclusiveness is the effect of the statute. Baker v. Field, 2 Yeates, 532; and see cases noted *ante*, p. 247, n. 4.

## CHAPTER XXIII.

DOMESTIC INTERNATIONAL LAW OF THE UNITED STATES. THE SUBJECT CONTINUED. THE MEANING AND EXTENT OF THE TERM, "THE CITIZENS OF EACH STATE," IN THE FIRST PARAGRAPH OF THE SECOND SECTION OF THE FOURTH ARTICLE OF THE CONSTITUTION.

§ 626. The first paragraph of the second section of the Fourth Article is in these words:

"The citizens of each State shall be entitled to all privileges and immunities of citizens in the several States."

The legal effect of this provision depends—

1. On the personal application of the words, "the citizens of each State," and—

2. On the rights intended by the phrase, "all privileges and immunities of citizens."

A distinct inquiry is presented by each phrase, but they both involve a determination of the force of the term *citizen*, as descriptive of a private person, or of his legal condition. In the first part of the clause it is denominative of a class of persons; in the latter part it is descriptive of a class of rights.

The Constitution does not itself furnish any definition of the term *citizen*, nor indicate its personal extent.<sup>1</sup> It has been shown that the terms employed in these clauses must be interpreted by their previous juridical use in enunciating that international and *quasi*-international law which had been sanctioned by the constituting people, or those to whose political and juridical power and place they had succeeded. In each of these branches of law those constant relations must have been recognized which are expressed in those definitions or axiomatic principles which have been called "the natural or necessary law of nations."<sup>2</sup> Before citing any authorities on this provi-

<sup>1</sup> Rawle on Const. p. 85; Taney, C. J., 19 How. 411; Curtis, ib. 577.

<sup>2</sup> *Ante*, § 49.



sion, or attempting an independent examination of either of the two points above specified, it is necessary to analyze the nature of either inquiry, by discriminating the various senses of the word *citizen* in the English, and of the cognate term in other European languages, as it may be used in describing these constant relations.

§ 627. We do not find the term *citizen* juridically employed in the English language to designate a relation or condition existing peculiarly under the law of England. All European languages derived from the Latin possess a term of the same origin, and in all it has, as popularly used, nearly the same variety of meanings, all expressive of the condition of a legal person in respect either to civil or to political privilege, or to both. But in designating the status of a private person with reference to the public law, it has, in some of the countries in whose vernacular the term is found, a very restricted signification compared with some of its meanings in other countries where the equivalent word is also popularly used with the same limited signification. In some juridical systems it may only be equivalent to *subject*, a word found in the same languages under analogous changes of form, and of like origin, expressing only that relation which every person within the limits of a political state holds towards the possessors of supreme power. From the very nature of civil society, organized in distinct states, the relation of subjection is everywhere the same.<sup>1</sup>

The term originally referred to the existence of municipal corporations and the local privileges of its members, which might be either civil (social) or political. It was a term of European internal laws, public and private, as distinguished from international law, indicative of a condition of the inhab-

<sup>1</sup> There may be many in this country who would question these propositions. Chief Justice Jay, in *Chisholm v. Georgia*, 2 Dallas, 470, said:—"At the Revolution, the sovereignty devolved on the people; and they are truly the sovereigns of the country, but they are sovereigns without subjects (unless the African slaves among us may be so called), and have none to govern but themselves. The citizens of America are equal as fellow-citizens, and joint tenants of the sovereignty." And Wilson, J., *ib.* 458:—"Under that Constitution, there are citizens, but no subjects." And see the opinions in *Dred Scott's* case, cited in this chapter. The idea that in republics the subject and the sovereign become identified, and the idea of the two existing together, as united opposites, in the idea of *citizen*, is probably derived from Rousseau.



itants of certain localities, or of some distinct class, as discriminated by the supreme power. It was a term of limited personal application, implying peculiar *personal* franchises in the individuals of a class, and differences of condition among the *subjects* of the state resulting from *personal* laws.<sup>1</sup> When the possession of these privileges ceased to be distinctive of any one portion of the inhabitants, the rights of the citizen would be synonymous with those of each subject of the state, and in the internal law of such state they would be convertible terms. Wherever the terms have been used to distinguish persons under the internal law, the condition of *citizen* includes, of necessity, whatever is expressed by *subject*; all rights and duties attributable to the subject are equally attributable to the citizen; while the condition of *subject* expresses only a limited portion of the relations indicated by the term *citizen*.

§ 623. All within the territory of a nation are *subjects* of its dominion to the extent of owing obedience to its laws;<sup>2</sup> and where no reference is had to any external relation of the state, the term *citizen* is often applied to all actually present within the territorial jurisdiction. But, even in expressing relations under the internal law, reference is often had to the co-existence of other nations; and hence distinctions arise between the persons actually subject to the same jurisdiction, founded on the natural circumstance of *birth*, the legal circumstance of *naturalization*, and the facts constituting what is technically called *domicil*. These facts and circumstances form the basis of private international law;<sup>3</sup> and when reference is had to the condition of private persons as connected with one or another of several co-existent states, it is only native or natural born subjects domiciled within the jurisdiction of a state, and those of foreign birth, likewise having a domicil therein, whom the supreme power may choose to put in the same relation towards itself as the native subject (*i. e.*, *naturalize*), who can be called *citizens*. Whether the word is then taken in the limited sense, equivalent to *subject*, or refers to a distinctive condition of personal privilege, it can apply only to native or naturalized persons having a domicil.

<sup>1</sup> *Ante*, § 107.

<sup>2</sup> *Ante*, § 273.

<sup>3</sup> *Ante*, § 121.

§ 629. Any relations between private persons or any distinctions in the condition of private persons under the internal law of one state may be recognized by the juridical power of any other state, in the application of private international law. The terms which first expressed distinctions of condition under the internal law may then, derivatively, be used in the enunciation of private international law.

By this law, applied by judicial tribunals, they necessarily recognize the anterior subjection of the alien to the juridical power of the state in which he had his previous domicil. For this law is founded on the fact that some relations of persons towards other persons and towards things may arise out of a previous subjection to another jurisdiction. The only limits to a recognition of such relations are the natural possibility of sustaining them in another forum, and the juridical will of the supreme power therein.<sup>1</sup>

§ 630. The relations thus recognized in an alien may be only those of political subjection and allegiance. In this case, the alien is recognized as a foreign *citizen*, or one having the rights of foreign citizenship, only in those relations which, in the case of the native or naturalized subject having a domicil, arise simply from political subjection. If known to the international law of the forum as a *citizen* of the country in which his domicil is recognized to be, it would only be in the sense equivalent to *native or naturalized subject having a domicil*.

But the civil privileges and immunities, or, generally, any legal rights, attributed to the alien by the law of his domicil, may also, by the will of the sovereign of the forum, be recognized therein, so far as they can, from their nature as individual or relative rights, be therein enjoyed or maintained. Indeed, there is always a presumption that, so far as the judicial tribunal acts independently of specific legislation, it will, to that extent, sustain rights and obligations created by the law of the alien's domicil.<sup>2</sup> If these rights or civil privileges of the alien, originally existing under the law of his domicil, are such as constitute him a *citizen* under that law, in the sense of one in

<sup>1</sup> *Ante*, § 75.

<sup>2</sup> On the principle set forth in Ch. II., the principle of comity, so called.

a condition of privilege beyond that of simple domiciled subject, native or naturalized, then the international law of the forum of jurisdiction may be said to recognize him as a foreign *citizen*, in the sense of one having a definite condition of privilege beyond that arising merely from subjection and allegiance to the country of his domicil.

If aliens are anywhere thus distinguished, some as being *citizens* in this enlarged sense, by the law of their domicil, and others as being only *subjects* not having citizenship in this sense; and especially if aliens are distinguished as having or not having a capacity for *citizenship*, in this enlarged sense, according to personal distinctions founded on either the law of their place of domicil, or the law of the forum, then *citizen* would have a distinct meaning from *subject*, as a term of private international law applied in that forum.

But if no such distinction be made between aliens, the terms *citizen* and *subject*, *foreign citizen* and *foreign subject*, would be convertible terms in the international law of the forum, whatever distinction might be made in the use of the words *citizen* and *subject*, as describing conditions under the internal law of that forum—that is, conditions of the domiciled inhabitants.

§ 631. With reference to these distinctions, the constitutional provision is susceptible of any one of the following readings :

1. The domiciled inhabitants, native or naturalized, of each State, shall be entitled to the privileges and immunities of domiciled inhabitants, native or naturalized, in the several States.

2. The domiciled inhabitants, native or naturalized, of each State, shall be entitled to the privileges and immunities of persons in a degree of civil privilege intended by the word *citizen*, as expressive of something more than the mere condition of domiciled inhabitant, native or naturalized, in the several States.

3. The domiciled inhabitants, native or naturalized, of each State, who therein enjoy citizenship, as something beyond the mere condition of domiciled inhabitants, native or naturalized, shall be entitled to the privileges and immunities of domiciled inhabitants, native or naturalized, in the several States.



4. The domiciled inhabitants, native or naturalized, of each State, who therein enjoy citizenship, as something beyond the mere condition of domiciled inhabitants, native or naturalized, shall be entitled to the privileges and immunities of citizenship as something beyond the mere condition of domiciled inhabitants, native or naturalized, in the several States.

§ 632. It has been shown that under the distribution of powers between the States and the national government, either source of law might confer on persons of foreign birth the rights which the native born inhabitant of a State holds in respect to such source; though neither of these could, unless by special provision, change the relation between such persons and the other source of law. Without such provision neither the national government nor the States could, separately, *naturalize* such persons; that is, place them in the relation of the native-born inhabitant, which exists towards each of these co-existent possessors of power.<sup>1</sup>

The Constitution vests in Congress the power to establish a uniform rule of naturalization. A rule of naturalization, whether uniform or not in its action in the different States and its application to aliens, could have but one effect or consequence—that is, to place the alien in the relation or position of a native-born inhabitant, who is in each State the natural subject of both the State and the United States.<sup>2</sup> Some of the States have conferred upon aliens privileges held by native inhabitants under their several authority, without reference to naturalization under the law of Congress. Even if such grant of privilege is valid under the Constitution, it is evident that such persons are still alien in respect to the national government, or the United States, holding sovereign powers within the same jurisdiction. In arguing against such grants of privilege by the States, or against State acts of naturalization as they have been called, it has been said that foreigners might thus become citizens of a several State; and then, by the operation of this provision, they would be admitted to the privileges and immunities of citizens in the several States; and

<sup>1</sup> *Ante*, §§ 391, 384.

<sup>2</sup> Curtis, J., 19 How. 578, and authorities.

that thus the State would in fact pass a naturalization law having uniform extent or operation in the several States: an effect which in all probability would prevent the result intended by the grant of power to Congress—that is, the establishment of *one* uniform rule of naturalization. But whether such so-called naturalization on the part of a State is valid under the Constitution or not, it may be said, in reference to the above supposed extension of its effects under this provision, that it does not appear that the foreigner would become a citizen of a State, in the sense of this provision; even if *citizen* here indicates only a native or naturalized inhabitant having a domicile.<sup>1</sup> Such foreigner would not by such State law be in the same relation as the native in respect to *all* laws operating in that State; and it must first be proved that the term *citizen*, in each part of this clause, only designates a person holding a certain relation towards the several State in which he is domiciled, and has no reference to his relation towards the United States and the national government.

Besides, by public international law (positive or practical law of nations), the relation of an alien-born inhabitant to his former sovereign continues, to a certain extent, to be recognized even in the country in which he is an alien; so that his obligations, under public law, in respect to that country and its civil power, are different from those of the native, until, by naturalization, the sovereign of such country has conferred new rights and transferred his obligations under public law. Hence the rights acquired by an alien, by such an exercise, of the “reserved” powers of a State, are not the same as those of the native, even in relations which, in the case of the native, are

<sup>1</sup> See *Chirac v. Chirac*, 2 Wheat. 261; Taney, Ch. J., 19 How. 405; Daniel, J., ib. 482; Curtis, J., ib. 578; McLean, J., ib. 533:—“No person can legally be made a citizen of a State, and consequently a citizen of the United States, of foreign birth, unless he be naturalized under the acts of Congress. Congress has power ‘to establish a uniform rule of naturalization.’ It is a power which belongs exclusively to Congress, as intimately connected with our Federal relations. A State may authorize foreigners to hold real estate within its jurisdiction, but it has no power to naturalize foreigners, and give them the rights of citizens. Such a right is opposed to the acts of Congress on the subject of naturalization, and subversive of the Federal powers. I regret that any countenance should be given from this bench to a practice like this in some of the States, which has no warrant in the Constitution.”

under its several share of sovereign power. Every private right derives a part of its essence from public law, and involves the co-existence of correspondent obligations imposed by that law.<sup>1</sup> All rights of a native inhabitant in each State are modified by his obligations, under the public law and Constitution of the United States, in reference to the nation and the powers held by the government of the United States. Therefore, whether *citizen* and *subject* are taken to be equivalent terms or not, the alien not naturalized in respect to the United States, or the national authority, is a citizen in an imperfect sense, even in respect to the several State. The privileges that have been granted to him by the State are not only local, merely, but are imperfect franchises, not constituting a *status* recognized in public international law. Therefore, the term *citizen* in this provision, whether taken to mean a subject merely, or a subject holding a particular degree of civil privilege, should not be taken to apply to aliens who hold the rights of native inhabitants only under the juridical authority of some several State.

It is not, however, necessary to consider this somewhat intricate question any farther; at least not in this connection, since the conclusion above stated may be taken to be supported by all the commentators on this provision of the fourth Article,<sup>2</sup> who uniformly assume that the term *citizen* here used refers only to persons native, or naturalized under the law of Congress. In each of the four readings of this provision before given, the word *naturalized* will therefore be taken to refer to naturalization under the law of Congress.

§ 633. Supposing the signification of the term *citizen* in either or both parts of the provision to be that of *domiciled inhabitant, native or naturalized under the law of Congress*, the meaning of these terms, or the nature of the relation expressed by them, may be taken to be too well settled, or too simple, to allow of any controversy. The possession of *citizenship*, in that sense, or its personal extent, may be supposed to be sufficiently obvious; the facts or circumstances which constitute

<sup>1</sup> Bacon, De Aug. L. 8, c. 3, s. 3:—"Sub tutela juris publici latet jus privatum."

<sup>2</sup> Story's Comm., § 1806.



domicil being supposed to be agreed upon. By this signification of the term the provision would, under the first of the readings before supposed, give to all domiciled inhabitants of each State, native, &c., only a right to enter and remain within other States of the Union, being therein subject to whatever regulations and distinctions the State has the power to establish among its own domiciled inhabitants; and the only rights which the domestic alien could claim, against the power of the State, would be such as the Constitution of the United States may have guaranteed to all persons subject to State jurisdiction. Under the third of the readings above supposed, this international right of entry, then limited to those domestic aliens only who are "citizens" in the sense of having a peculiar condition of privilege, would, in like manner, make their subjection, in the State forum to which they might come as domestic aliens, the same as that of the domiciled inhabitants of the State.

Supposing a condition of civil privilege, beyond that attributable to persons simply as the domiciled inhabitants of a State, native or naturalized, to be implied by the term *citizen*, the question would arise under the third and fourth of the readings above given, What is the personal extent of the term "the citizens of each State," in this sense of the word *citizen*? and under the second and fourth readings, What is the nature of the privileges and immunities secured or guaranteed by that latter part of the clause?

§ 634. Not only then must the use of the term *citizen*, in this provision, be determined, either in the sense of a domiciled inhabitant, native or naturalized, under the law of Congress, or in the sense indicating a condition of superior privilege; but, *if the latter sense is adopted*, it must be inquired:

1. Whether the persons to be so regarded as "citizens of each State" are determined by the juridical will of the State of their domicil; or whether there is some national or common standard for their recognition. (For, since the persons alluded to are spoken of as being citizens in the State of their domicil, it cannot be supposed that their claim to that denomination is

to be determined by the will of the State in which they may afterwards appear as aliens.)

2. Whether the nature of the rights here called "the privileges and immunities of citizens," which are, by this provision, to be enjoyed by "the citizens of each State" in the several States, depends upon the law of their domicil, or the law of the State in which they may appear as aliens; or whether some common criterion of those privileges and immunities is here implied, and if so, where it is to be found.

It may at first seem unwarrantable to attribute such a latitude to the inquiries arising under this provision. But, as will be shown, in searching for authoritative expositions of this clause, all, or nearly all, these varieties of meaning have been actually supposed or maintained in judicial opinions, or by the most distinguished commentators on this provision, or in the arguments held before State legislatures when considering laws proposed for the regulation of international relations towards other States of the Union.

§ 665. The interpretation of the term citizens of each State in this provision has probably been judicially considered only in cases wherein the question has been: Can persons of negro race be citizens, within the meaning of this clause? The State statutes prohibiting the immigration of free blacks have been enumerated, and the cases noted in which the question of their validity, in view of this clause, has been discussed.<sup>1</sup> So far as judicial opinion has been expressed on the question, it seems almost unanimous that these laws would be unconstitutional, were negroes to be held citizens of a State in view of this provision, and also that negroes are not such citizens.

The questions of the constitutionality of those State laws which prohibit the immigration of free colored persons, or of those, of some seaboard States, which subject free colored per-

<sup>1</sup> See *Ante*, the statutes and cases noted, under laws of Virginia, pp. 5, 9; Kentucky, pp. 15, n., 16, 18, n.; Maryland, pp. 20, 21; Connecticut, p. 45; Delaware, pp. 78, 80; North Carolina, p. 86; Tennessee, p. 92; South Carolina, pp. 97, 99, 100; Georgia, pp. 104, 105, 107; Ohio, p. 118; Indiana, pp. 130, 131; Illinois, pp. 134, 135, 136; Mississippi, pp. 146, 147, 148; Alabama, pp. 151, 152; Louisiana, pp. 158, 161, 163; Missouri, p. 170; Arkansas, p. 172; Iowa, pp. 176, 177; Florida, pp. 191, 193, 195; Texas, p. 197; Oregon, p. 216.

sons on board of vessels, while within their harbors, to imprisonment, &c., have never been brought before the tribunals of the national government.<sup>1</sup>

The resolution of Congress, March 2, 1821, providing for the admission of the State of Missouri on a certain condition,<sup>2</sup> has sometimes been referred to as a recognition, by Congress, of free blacks as citizens under this provision.<sup>3</sup> But it is certainly nothing more than an affirmance or recognition of the provision in the Constitution as it stands, without determining either the personal extent of the terms "citizens of each State," or the nature of the privileges and immunities to which they are entitled under it.

§ 636. The decision of the Supreme Court of the United States in *Dred Scott v. Sandford*, on the plea in abatement that the plaintiff was not a citizen in the sense of the word in Article III. sec. 2, of the Constitution, has been noticed in the first volume.<sup>4</sup> Strictly speaking, it is not an authority in point on the question, Who are *citizens* in the sense of the word in the fourth Article? But those members of the court who discussed the plea, with the exception of Judge McLean, evidently suppose the word to have like force in either place. And their reasoning indicates that the question under the fourth Article was more the object of their attention than was that under the third. The extracts herein given are those which seem most material in this connection, though it must be remembered that disconnected from the rest they may not give an adequate idea of the reasoning.

On page 403 of the report, in 19 Howard, Chief Justice Taney, delivering the opinion of the court, says:—

"The question is simply this: Can a negro, whose ancestors

<sup>1</sup> From the fact that Mr. Hoar, of Massachusetts, who visited Charleston, S. C., in 1843 or 1844, with the known intention of bringing the question of the constitutionality of the law of South Carolina before the national judiciary for the protection of colored seamen from his own State, was expelled from that city by the violence of a mob, it would appear that the citizens had not sufficient confidence in the validity of their legislation to allow it to be subjected to inquiry even in the judicial tribunals of their own State. For if no action lies in the U. S. courts, it would have been the power of the State courts to protect the citizen against any usurpation of jurisdiction.

<sup>2</sup> *Ante*, p. 168.

<sup>3</sup> *Jay's Inquiry*, &c., p. 43. Curtis, J., in 19 Howard, 587.

<sup>4</sup> Vol. I. p. 434.



were imported into this country, and sold as slaves, become a member of the political community formed and brought into existence by the Constitution of the United States, and as such become entitled to all the rights, and privileges, and immunities guaranteed by that instrument to the citizen? One of which rights is the privilege of suing in a court of the United States in the cases specified in the Constitution.

"It will be observed that the plea applies to that class of persons only whose ancestors were negroes of the African race, and imported into this country, and sold and held as slaves. The only matter in issue before the court, therefore, is, whether the descendants of such slaves, when they shall be emancipated, or who are born of parents who had become free before their birth, are citizens of a State, in the sense in which the word citizen is used in the Constitution of the United States.<sup>1</sup> And this being the only matter in dispute on the pleadings, the court must be understood as speaking in this opinion of that class only, that is, of those persons who are the descendants of Africans who were imported into this country, and sold as slaves."

After a paragraph relating to the status of Indians,<sup>2</sup> the Chief Justice continues, on p. 404:—

<sup>1</sup> The reader will note the importance of this statement of the issue in connection with other questions discussed in these opinions. It is remarkable too that here and afterwards in stating his conclusion (19 How. 427), the Chief Justice recognizes the question to be, Who are *citizens of a State*? though in the argument it is assumed that the citizenship in question is not citizenship in respect to a *State*, but in respect to a different political person, that is, *the United States*, or that the question is, who are *citizens of the United States*?

<sup>2</sup> 19 How. 403:—"The situation of this population was altogether unlike that of the Indian race. The latter, it is true, formed no part of the colonial communities, and never amalgamated with them in social connections or in government. But although they were uncivilized, they were yet a free and independent people, associated together in nations or tribes, and governed by their own laws. Many of these political communities were situated in territories to which the white race claimed the ultimate [404] right of dominion. But that claim was acknowledged to be subject to the right of the Indians to occupy it as long as they thought proper, and neither the English nor colonial governments claimed or exercised any dominion over the tribe or nation by whom it was occupied, nor claimed the right to the possession of the territory until the tribe or nation consented to cede it. These Indian governments were regarded and treated as foreign governments, as much so as if an ocean had separated the red man from the white; and their freedom has constantly been acknowledged, from the time of the first emigration to the English colonies to the present day, by the different governments which succeeded each other. Treaties have been negotiated with them, and their alliance sought for in war; and the people who compose these Indian political communities have always been treated as foreigners not living under our government. It

"We proceed to examine the case as presented by the pleadings.

"The words 'people of the United States' and 'citizens' are synonymous terms, and mean the same thing. They both describe the political body who, according to our republican institutions, form the sovereignty, and who hold the power and conduct the government through their representatives. They are what we familiarly call the 'sovereign people,' and every citizen is one of this people, and a constituent member of this sovereignty.<sup>1</sup> The question before us is, whether the class of persons described in the plea in abatement compose a portion of this people, and are constituent members of this sovereignty? We think they are not, and that they are not included, and were not intended to be included, under the word 'citizens' in the Constitution, and can therefore claim none of the rights and privileges which that instrument provides for and secures to citizens of the United States. On the contrary, they were at that time considered as a subordinate [405] and inferior class of beings, who had been subjugated by the dominant race, and, whether emancipated or not, yet remained subject to their authority, and had no rights or privileges but such as those who held the power and the government might choose to grant them."<sup>2</sup>

is true that the course of events has brought the Indian tribes within the limits of the United States under subjection to the white race; and it has been found necessary, for their sake as well as our own, to regard them as in a state of pupilage, and to legislate to a certain extent over them and the territory they occupy. But they may, without doubt, like the subjects of any other foreign government, be naturalized by the authority of Congress, and become citizens of a State, and of the United States; and if an individual should leave his nation or tribe, and take up his abode among the white population, he would be entitled to all the rights and privileges which would belong to an emigrant from any other foreign people."

This recognition of the possible citizenship of Indians is important in view of the general question. The argument seems to recognize their possible citizenship as a consequence of the recognition in international public law, and by the United States, of political communities composed of Indians, and the doctrine seems to be implied in other places that political communities composed of negroes have not and cannot be so recognized. This idea is prominently maintained in Judge Daniel's opinion, 19 How. 475. See *ante*, vol. I. p. 321, note, and the reflex of these opinions in the Florida case, *ante*, p. 195, n.

<sup>1</sup> See the note on this passage, *ante*, vol. I. p. 412, n. 2.

<sup>2</sup> And on p. 409 of the report, referring to the laws of the States, "they show that a perpetual and impassable barrier was intended to be erected between the white race and the one which they had reduced to slavery and governed as subjects with absolute and despotic power," &c. The doctrine seems to be implied that

"It is not the province of the court to decide upon the justice or injustice, the policy or impolicy, of these laws. \* \* \*

"In discussing this question, we must not confound the rights of citizenship which a State may confer within its own limits, and the rights of citizenship as a member of the Union. It does not by any means follow, because he has all the rights and privileges of a citizen of a State, that he must be a citizen of the United States. He may have all of the rights and privileges of the citizen of a State, and yet not be entitled to the rights and privileges of a citizen in any other State. For, previous to the adoption of the Constitution of the United States, every State had the undoubted right to confer on whomsoever it pleased the character of citizen, and to endow him with all its rights. But this character of course was confined to the boundaries of the State, and gave him no rights or privileges in other States beyond those secured to him by the laws of nations and the comity of States. Nor have the several States surrendered the power of conferring these rights and privileges by adopting the Constitution of the United States. Each State may still confer them upon an alien, or any one it thinks proper, or upon any class or description of persons; yet he would not be a citizen in the sense in which that word is used in the Constitution of the United States, nor entitled to sue as such in one of its courts, nor to the privileges and immunities of a citizen in the other States. The rights which he would acquire would be restricted to the State which gave them. The Constitution has conferred on Congress the right to establish an uniform rule of naturalization, and this right is evidently exclusive, and has always been held by this court to be so. Consequently, no State, since the adoption of the Constitution, can by naturalizing an alien invest him with the rights and privileges secured to a citizen of a State under the Federal Government, although, so far as the State alone was concerned, he would undoubtedly be entitled to the rights of a citizen, and clothed with all the [406] rights and immuni-

the rights of a white inhabitant are in no wise the effects of law, but, like the sovereignty possessed by the people (*ante*, vol. I. p. 414), a right above law. See also the Florida case, above cited.



ties which the Constitution and laws of the State attached to that character.

"It is very clear, therefore, that no State can, by any act or law of its own, passed since the adoption of the Constitution, introduce a new member into the political community created by the Constitution of the United States. It cannot make him a member of this community by making him a member of its own. And for the same reason it cannot introduce any person or description of persons, who were not intended to be embraced in this new political family, which the Constitution brought into existence, but were intended to be excluded from it.

"The question then arises, whether the provisions of the Constitution, in relation to the personal rights and privileges to which the citizen of a State should be entitled, embraced the negro African race, at that time in this country, or who might afterwards be imported, who had then or should afterwards be made free in any State; and to put it in the power of a single State to make him a citizen of the United States, and endue him with the full rights of citizenship in every other State without their consent? Does the Constitution of the United States act upon him whenever he shall be made free under the laws of a State, and raised there to the rank of a citizen, and immediately clothe him with all the privileges of a citizen in every other State and in its own courts?

"The court think the affirmative of these propositions cannot be maintained. And if it cannot, the plaintiff in error could not be a citizen of the State of Missouri, within the meaning of the Constitution of the United States, and consequently, was not entitled to sue in its courts.

"It is true, every person, and every class and description of persons, who were at the time of the adoption of the Constitution recognized as citizens in the several States, became also citizens of this new political body, but none other; it was formed by them, and for them and their posterity, but for no one else. And the personal rights and privileges guaranteed to citizens of this new sovereignty were intended to embrace those only who were then members of the several State com-

munities, or who should afterwards, by birthright or otherwise, become members, according to the provisions of the Constitution and the principles on which it was founded.<sup>1</sup> It was the union of those who were at that time members of distinct and separate political communities into one political family, whose power, for certain specified purposes, was to extend over the whole territory of the United States. And it gave to each citizen rights and privileges outside of his State [407] which he did not before possess, and placed him in every other State upon a perfect equality with its own citizens as to rights of person and rights of property; it made him a citizen of the United States.

"It becomes necessary, therefore, to determine who were citizens of the several States when the Constitution was adopted. And in order to do this, we must recur to the governments and institutions of the thirteen colonies, when they separated from Great Britain and formed new sovereignties, and took their places in the family of independent nations. We must inquire who, at that time, were recognized as the people or citizens of a State, whose rights and liberties had been outraged by the English government, and who declared their independence, and assumed the powers of government to defend their rights by force of arms.

"In the opinion of the court, the legislation and histories of the times, and the language used in the Declaration of Independence, show that neither the class of persons who had been imported as slaves, nor their descendants, whether they had become free or not, were then acknowledged as a part of the people, nor intended to be included in the general words used in that memorable instrument.

<sup>1</sup> There seems to be an admission here that negroes might have been citizens of a State at the adoption of the Constitution, and under it, citizens of the United States. The Chief Justice would read the Constitution as saying,—Those who are *now*—at the time of its adoption only—citizens of a State shall, &c. But then it is unsupported assumption to limit the capacity for citizenship thereafter to whites, or to the descendants of the white citizens. In fact, it is of the nature of any Constitution that it be understood as being continuously promulgated, as spoken always in the present tense. It is certainly a new idea—that the individuals who should thereafter, in each State, constitute the sovereignty or the political people thereof, were to be determined by the Constitution of the United States, or by some principle having equal authority and extent. If correct, it accords with the idea of an integral people of the United States.



"It is difficult at this day to realize the state of public opinion in relation to that unfortunate race, which prevailed in the civilized and enlightened portions of the world at the time of the Declaration of Independence, and when the Constitution of the United States was framed and adopted. But the public history of every European nation displays it in a manner too plain to be mistaken. They had for more than a century before been regarded as,"<sup>1</sup> &c.

Judge Taney here begins what may be described as an historical exposition of the legislative sentiment of those by whom the Constitution was actually adopted, as given in colonial law, the Declaration of Independence, the Constitution itself, and in the legislation and jurisprudence of the States shortly after its adoption. The only colonial laws cited are Acts of Maryland, 1717, c. 13, § 5, and of Massachusetts, 1705, c. 6, which prohibited intermarriage of whites and blacks.<sup>2</sup> After which, on p. 499, the Judge says:—

"We refer to these historical facts for the purpose of showing the fixed opinions concerning that race, upon which the statesmen of that day spoke and acted. It is necessary to do this, in order to determine whether the general terms used in the Constitution of the United States, as to the rights of man and the rights of the people, were intended to include them, or to give to them or their posterity the benefit of any of its provisions.

"The language of the Declaration of Independence is equally conclusive. It begins,"<sup>3</sup> &c. On p. 410, the Chief Justice then says:—

"Yet the men who framed this declaration were great men—high in literary acquirements—high in their sense of honor, and incapable of asserting principles inconsistent with those on which they were acting. They perfectly understood the meaning of the language they used, and how it would be un-

<sup>1</sup> See note on this passage, *ante*, Vol. I. p. 207, n. 1.

<sup>2</sup> If restriction, in respect to marriage, is incompatible with citizenship, why is not the prohibition on the white to marry a negro to be considered? To assume that what is disability on the one party is privilege on the other, is very like begging the question.

<sup>3</sup> See the note on this passage, *ante*, Vol. I. p. 471, note 2.



derstood by others; and they knew that it would not in any part of the civilized world be supposed to embrace the negro race, which, by common consent, had been excluded from civilized governments and the family of nations, and doomed to slavery. They spoke and acted according to the then established doctrines and principles, and in the ordinary language of the day, and no one misunderstood them. The unhappy black race were separated from the white by indelible marks, and laws long before established, and were never thought of or spoken of except as property, and when the claims of the owner, or the profit of the trader, were supposed to need protection.

"This state of public opinion had undergone no change when the Constitution was adopted, as is equally evident from its provisions and language.

"The brief preamble sets forth by whom it was formed, for what purposes, and for whose benefit and protection. It declares [411] that it is formed by the *people* of the United States: that is to say, by those who were members of the different political communities in the several States; and its great object is declared to be to secure the blessings of liberty to themselves and their posterity. It speaks in general terms of the *people* of the United States, and of *citizens* of the several States, when it is providing for the exercise of the powers granted or the privileges secured to the citizen. It does not define what description of persons are intended to be included under these terms, or who shall be regarded as a citizen and one of the people. It uses them as terms so well understood, that no further description or definition was necessary.

"But there are two clauses in the Constitution which point directly and specifically to the negro race as a separate class of persons, and show clearly that they were not regarded as a portion of the people or citizens of the government then formed.

"One of these clauses reserves to each of the thirteen States the right to import slaves until the year 1808, if it thinks proper. And the importation which it thus sanctions was unquestionably of persons of the race of which we are speaking,

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as the traffic in slaves in the United States had always been confined to them. And by the other provision the States pledge themselves to each other to maintain the right of property of the master, by delivering up to him any slave who may have escaped from his service, and be found within their respective territories. By the first above-mentioned clause, therefore, the right to purchase and hold this property is directly sanctioned and authorized for twenty years by the people who framed the Constitution. And by the second, they pledge themselves to maintain and uphold the right of the master in the manner specified, as long as the government they then formed should endure. And these two provisions show conclusively that neither the description of persons therein referred to, nor their descendants, were embraced in any of the other provisions of the Constitution; for certainly these two clauses were not intended to confer on them or their posterity the blessings of liberty, or any of the personal rights so carefully provided for the citizen.<sup>1</sup>

"No one of that race had ever migrated to the United States voluntarily; all of them had been brought here as articles of merchandise. The number that had been emancipated at that time were but few in comparison with those held in slavery; and they were identified in the public mind with the race to which they belonged, and regarded as a part of the slave population rather than the free. It is obvious that they were not [412] even in the minds of the framers of the Constitution when they were conferring special rights and privileges upon the citizens of a State in every other part of the Union.

"Indeed, when we look to the condition of this race in the several States at the time, it is impossible to believe that these rights and privileges were intended to be extended to them.

"It is very true, that in that portion of the Union where the labor of the negro race was found to be unsuited to the climate and unprofitable to the master, but few slaves were held at the time of the Declaration of Independence; and when the Con-

<sup>1</sup> The major proposition of this argument is,—no one can be a citizen or free-man by the law of a country, if he is classed by physiologists with persons who, in the same country, may be held in slavery.

stitution was adopted, it had entirely worn out in one of them, and measures had been taken for its gradual abolition in several others. But this change had not been produced by any change of opinion in relation to this race; but because it was discovered from experience that slave labor was unsuited to the climate and productions of these States; for some of the States, where it had ceased or nearly ceased to exist, were actively engaged in the slave trade, procuring cargoes on the coast of Africa, and transporting them for sale to those parts of the Union where their labor was found to be profitable, and suited to the climate and productions. And this traffic was openly carried on, and fortunes accumulated by it, without reproach from the people of the States where they resided. And it can hardly be supposed that, in the States where it was then countenanced in its worst form—that is, in the seizure and transportation—the people could have regarded those who were emancipated as entitled to equal rights with themselves.

“And we may here again refer, in support of this proposition, to the plain and unequivocal language of the laws of the several States, some passed after the Declaration of Independence and before the Constitution was adopted, and some since the government went into operation.

“We need not refer, on this point, particularly to the laws of the present slaveholding States. Their statute books are full of provisions in relation to this class, in the same spirit with the Maryland law which we have before quoted. They have continued to treat them as an inferior class, and to subject them to strict police regulations, drawing a broad line of distinction between the citizen and the slave races, and legislating in relation to them upon the same principle which prevailed at the time of the Declaration of Independence. As relates to these States, it is too plain for argument, that they have never been regarded as a part of the people or citizens of the State, nor supposed to possess any political rights which the dominant race might not withhold or grant at their pleasure.’ [413] And as long ago as 1822, the Court of Appeals of Ken-

<sup>1</sup> Compare the similar passages *ante*, p. 282, and note 2.



tucky decided that free negroes and mulattoes were not citizens within the meaning of the Constitution of the United States; and the correctness of this decision is recognized, and the same doctrine affirmed, in 1 Meig's Tenn. Reports, 331."<sup>1</sup>

The Chief Justice then again turns to the legislation of the States which have abolished slavery. After noticing the law of Massachusetts of 1786, continued in the Code of 1836, on marriage, Judge Taney refers particularly to the laws of Connecticut, arguing, from the terms of the acts of 1774 and 1784, prohibiting the importation of slaves and abolishing slavery, that the intention or motive of the legislator was not to confer rights on the negro, but to protect or benefit the white population; and, noticing the law of 1833 and Crandall's case.<sup>2</sup> And observes that, "if we find that, at the time the Constitution was adopted, they were not even there [*i. e.*, Connecticut] raised to the rank of citizens, but were still held and treated as property, and the laws relating to them passed with reference altogether to the interest and convenience of the white race, we shall hardly find them elevated to a higher rank any where else."

Besides these, the militia law of New Hampshire, of 1815, permitting whites only to be enrolled in the militia,<sup>3</sup> and the marriage law of Rhode Island of 1822, re-enacted in 1844, are the only State laws mentioned. On p. 416 the Chief Justice proceeds to say:—

"It would be impossible to enumerate and compress in the space usually allotted to an opinion of a court the various laws, marking the condition of this race, which were passed from time to time after the Revolution, and before and since the adoption of the Constitution of the United States. In addition to those already referred to, it is sufficient to say that Chancellor Kent, whose accuracy and research no one will question, states in the sixth edition of his Commentaries (published in 1848, 2d vol., 258, note *b*), that in no part of the country, ex-

<sup>1</sup> See *ante*, pp. 16, 92.

<sup>2</sup> See *ante*, pp. 41-46.

<sup>3</sup> The Judge says:—"Nothing could more strongly mark the entire repudiation of the African race. The alien is excluded because, being born in a foreign country, he cannot be a member of the community until he is naturalized. But why are the African race, born in the State, not permitted to share in one of the highest duties of the citizen? The answer is obvious; he is not, by the institutions and laws of the State, numbered among its people. He forms no part of the sovereignty of the State, and is not, therefore, called upon to maintain it."

cept Maine, did the African race, in point of fact, participate equally with the whites in the exercise of civil and political rights.

"The legislation of the States therefore shows, in a manner not to be mistaken, the inferior and subject condition of that race at the time the Constitution was adopted, and long afterwards, throughout the thirteen States by which that instrument was framed; and it is hardly consistent with the respect due to these States, to suppose that they regarded at that time, as fellow-citizens and members of the sovereignty, a class of beings whom they had thus stigmatized; whom, as we are bound, out of respect to the State sovereignties, to assume they had deemed it just and necessary thus to stigmatize, and upon whom they had impressed such deep and enduring marks of inferiority and degradation; or, that when they met in convention to form the Constitution, they looked upon them as a portion of their constituents, or designed to include them in the provisions so carefully inserted for the security and protection of the liberties and rights of their citizens. It cannot be supposed<sup>1</sup> that they intended to secure to them rights, and privileges, and rank, in the new political body throughout the Union, which every one of them denied within the limits of its own dominion. More especially, it cannot be believed, that the large slaveholding States regarded them as included in the word citizens, or would have consented to a Constitution which might compel them to receive them in that character from another State. For, if they were so received, and entitled to the privileges and immunities of citizens, it would exempt them from the operation of the special laws and from the police regulations [417] which they considered to be necessary for their own safety. It would give to persons of the negro race, who were recognized as citizens in any one State of the Union, the right to enter every other State whenever they pleased, singly or in companies, without pass or passport, and without obstruction, to sojourn there as long as they pleased, to go where they

<sup>1</sup> What follows here, together with many other passages in the residue of the opinion, bears directly on the question considered in the next chapter. These passages show that the bearing of the decision of this case on questions arising under the fourth Article was not forgotten by the court.



pleased at every hour of the day or night without molestation, unless they committed some violation of law for which a white man would be punished; and it would give them the full liberty of speech in public and in private upon all subjects upon which its own citizens might speak; to hold public meetings upon political affairs, and to keep and carry arms wherever they went. And all of this would be done in the face of the subject race of the same color, both free and slaves, and inevitably producing discontent and insubordination among them, and endangering the peace and safety of the State.<sup>1</sup>

"It is impossible, it would seem, to believe that the great men of the slaveholding States, who took so large a share in framing the Constitution of the United States, and exercised so much influence in procuring its adoption, could have been so forgetful or regardless of their own safety and the safety of those who trusted and confided in them.

"Besides, this want of foresight and care would have been utterly inconsistent with the caution displayed in providing for the admission of new members into this political family. For, when they gave to the citizens of each State the privileges and immunities of citizens in the several States, they at the same time took from the several States the power of naturalization, and confined that power exclusively to the Federal Government. No State was willing to permit another State to determine who should or should not be admitted as one of its citizens, and entitled to demand equal rights and privileges with their own people, within their own territories. The right of naturalization was, therefore, with one accord, surrendered by the States, and confided to the Federal Government. And this power granted to Congress to establish a uniform rule of *naturalization* is, by the well-understood meaning of the word, confined to persons born in a foreign country, under a foreign Government. It is not a power to raise to the

<sup>1</sup> As it stands here the argument is:—Negroes cannot be citizens in the sense of the word in the second section of the third Article, because it would lead to their being recognized as citizens in the sense of the word in this clause of the fourth, which consequence, it is here assumed in the argument, had by some previous demonstration been excluded. But, though the argument be herein defective, it is evident that the method of interpretation applied to *citizen of a State* in the third Article will apply as well to the same phrase in the fourth Article.



rank of a citizen any one born in the United States, who, from birth or parentage, by the laws of the country, belongs to an inferior and subordinate class.<sup>1</sup> And when we find the States guarding themselves from the indiscreet or improper admission by other States of emigrants from other countries, by giving the power exclusively to Congress, we cannot fail to see that they could never have left with the States a much [418] more important power—that is, the power of transforming into citizens a numerous class of persons, who in that character would be much more dangerous to the peace and safety of a large portion of the Union, than the few foreigners one of the States might improperly naturalize. The Constitution, upon its adoption, obviously took from the States all power by any subsequent legislation to introduce as a citizen into the political family of the United States any one, no matter where he was born, or what might be his character or condition; and it gave to Congress the power to confer this character upon those only who were born outside of the dominions of the United States. And no law of a State, therefore, passed since the Constitution was adopted, can give any right of citizenship outside of its own territory.”

The Chief Justice then refers to the language of the Articles of Confederation as indicating this discrimination among the inhabitants of the States. He declares that it is “very clear” that “free inhabitants” in the Article means only free *white* inhabitants, and argues, also, that the change of words in the Constitution indicates that citizen is more than “free inhabitant,” even if that applied to free negroes.

Judge Taney afterwards (19 How., 419–421) refers to the

<sup>1</sup> In this argument naturalization is supposed to have in the Constitution a different meaning from that which it has in the jurisprudence of England and continental Europe (*ante*, p. 275). The idea that it means making an alien citizen in a higher sense than native-born subject is new, unless it may have been suggested by Judge Mills in the Kentucky case (*ante*, p. 16, n.) But, if this be admitted, it is mere assumption, or arguing in a circle, to say that the power to naturalize does not extend to negroes *because* they are, “by the laws of the country, of an inferior class;” for the very question here is—Are they of such an inferior class, in view of the Constitution, that they cannot be citizens of a State?

<sup>2</sup> It is difficult to fix upon a term general enough to include the negro race, and also in harmony with the language of this opinion. Judge Taney will not allow that negroes of any status can be *citizens*, or *free inhabitants*, or *people*. He has designated them as still *property* after manumission or emancipation.

legislation of Congress in admitting only white aliens to naturalization, and the acts wherein the term citizen is used in connection with words distinguishing persons in respect to color, as confirming the view which limits the term *citizen of the United States* to whites.<sup>1</sup> These laws will hereinafter be noticed. The part of the opinion which then follows (19 How., 421-423) is more particularly applicable to the question considered in the next chapter, viz.: What are the privileges and immunities secured to citizens by this clause of the fourth Article? But it is here to be noticed as repudiating the idea that the term *citizen* may have different meanings in different connections.

Judge Taney here says:—"But it is said that a person may be a citizen, and entitled [422] to that character, although he does not possess all the rights which may belong to other citizens; as, for example, the right to vote, or to hold particular offices; and that yet, when he goes into another State, he is entitled to be recognized there as a citizen, although the State may mea-

<sup>1</sup> In the Chief Justice's argument *citizenship* is taken to mean a condition of civil privilege beyond the simple condition of *domiciled inhabitant, native or naturalized*, and the power of naturalization is taken to be the power of making a person a citizen in this enlarged sense. So the Judge argues in other places that the States cannot now determine who are citizens, *because* the power to naturalize has been given to Congress (19 How., 405). And he here speaks of *naturalizing* the native-born Indian, and denies all power in Congress to *naturalize* the American-born negro. The Judge says:—"Now, the Constitution does not limit the power of Congress in this respect to white persons. And they may, if they think proper, authorize the naturalization of any one, of any color, who was born under allegiance to another government. But the language of the law above quoted shows that citizenship at that time was perfectly understood to be confined to the white race; and that they alone constituted the sovereignty in the government.

"Congress might, as we before said, have authorized the naturalization of Indians, because they were aliens and foreigners. But, in their then untutored and savage state, no one would have thought of admitting them as citizens in a civilized community. And, moreover, the atrocities they had but recently committed, when they were the allies of Great Britain in the Revolutionary war, were yet fresh in the recollection of the people of the United States, and they were even then guarding themselves against the threatened renewal of Indian hostilities. No one supposed, then, that any Indian would ask for, or was capable of enjoying, the privileges of an American citizen, and the word white was not used with any particular reference to them.

"Neither was it used with any reference to the African race imported into or born in this country; because Congress had no power to naturalize them, and therefore there was no necessity for using particular words to exclude them.

"It would seem to have been used merely because it followed out the line of division which the Constitution has drawn between the citizen race, who formed and held the Government, and the African race, which they held in subjection and slavery, and governed at their own pleasure." 19 How. 419, 420.



sure his rights by the rights which it allows to persons of a like character or class resident in the State, and refuse to him the full rights of citizenship.

"This argument overlooks the language of the provision in the Constitution of which we are speaking.

"Undoubtedly, a person may be a citizen, that is, a member of the community who form the sovereignty, although he exercises no share of the political power, and is incapacitated from holding particular offices. Women and minors, who form a part of the political family, cannot vote; and when a property qualification is required to vote or hold a particular office, those who have not the necessary qualification cannot vote or hold the office, yet they are citizens.

"So, too, a person may be entitled to vote by the law of the State, who is not a citizen even of the State itself. And in some of the States of the Union foreigners not naturalized are allowed to vote. And the State may give the right to free negroes and mulattoes, but that does not make them citizens of the State, and still less of the United States. And the provision in the Constitution giving privileges and immunities in other States does not apply to them.

"Neither does it apply to a person who, being the citizen of a State, migrates to another State. For then he becomes subject to the laws of the State in which he lives, and he is no longer a citizen of the State from which he removed. And the State in which he resides may then, unquestionably, determine his *status* or condition, and place him among the class of persons who are not recognized as citizens, but belong to an inferior and subject race; and may deny him the privileges and immunities enjoyed by its citizens.

"But so far as mere rights of person are concerned, the provision in question is confined to citizens of a State who are temporarily in another State without taking up their residence there. It gives them no political rights in the State, as to voting or holding office, or in any other respect. For a citizen of one State has no right to participate in the government of another. But if he ranks as a citizen in the State to which he belongs, within the meaning of the Constitution of the United



States, then, whenever he goes into another State, the Constitution clothes him, as to the rights of person, with all the privileges and immunities which belong to citizens of the [423] State. And if persons of the African race are citizens of a State, and of the United States, they would be entitled to all of these privileges and immunities in every State, and the State could not restrict them; for they would hold these privileges and immunities under the paramount authority of the Federal Government, and its courts would be bound to maintain and enforce them, the Constitution and laws of the State to the contrary notwithstanding. And if the States could limit or restrict them, or place the party in an inferior grade, this clause of the Constitution would be unmeaning, and could have no operation, and would give no rights to the citizen when in another State. He would have none but what the State itself chose to allow him. This is evidently not the construction or meaning of the clause in question. It guarantees rights to the citizen, and the State cannot withhold them. And these rights are of a character and would lead to consequences which make it absolutely certain that the African race were not included under the name of citizens of a State, and were not in the contemplation of the framers of the Constitution, when these privileges and immunities were provided for the protection of the citizen in other States."

The case of *Legrand v. Darnall*, 2 Peters, 664, which had been referred to as a decision that the descendant of a slave may sue as a citizen in a court of the United States, is then examined (19 How. 423-425). Judge Taney then says:—

"The only two provisions which point to them<sup>1</sup> and include them, treat them as property, and make it a duty of the government to protect it; no other power, in relation to this race, is to be found in the Constitution; and as it is a government [426] of special, delegated powers, no authority beyond these two provisions can be constitutionally exercised. The government of the United States had no right to interfere for any other

<sup>1</sup> It would appear that the antecedent is "the African race," mentioned in the close of the paragraph preceding the citation of *Legrand v. Darnall*, 19 How. 423.

purpose but that of protecting the rights of the owner, leaving it altogether with the several States to deal with this race, whether emancipated or not, as each State may think justice, humanity, and the interests and safety of society require. The States evidently intended to reserve this power exclusively to themselves.

"No one, we presume, supposes that any change in public opinion or feeling, in relation to this unfortunate race, in the civilized nations of Europe or in this country, should induce the court to give to the words of the Constitution a more liberal construction in their favor than they were intended to bear when the instrument was framed and adopted. Such an argument would be altogether inadmissible in any tribunal called on to interpret it. If any of its provisions are deemed unjust, there is a mode prescribed in the instrument itself by which it may be amended; but while it remains unaltered, it must be construed now as it was understood at the time of its adoption. It is not only the same in words, but the same in meaning, and delegates the same powers to the government, and reserves and secures the same rights and privileges to the citizen; and as long as it continues to exist in its present form, it speaks not only in the same words, but with the same meaning and intent with which it spoke when it came from the hands of its framers, and was voted on and adopted by the people of the United States. Any other rule of construction would abrogate the judicial character of this court, and make it the mere reflex of the popular opinion or passion of the day. This court was not created by the Constitution for such purposes. Higher and graver trusts have been confided to it, and it must not falter in the path of duty.

"What the construction was at that time, we think can hardly admit of doubt. We have the language of the Declaration of Independence and of the Articles of Confederation, in addition to the plain words of the Constitution itself; we have the legislation of the different States, before, about the time, and since, the Constitution was adopted; we have the legislation of Congress, from the time of its adoption to



a recent period; and we have the constant and uniform action of the Executive Department, all concurring together, and leading to the same result. And if anything in relation to the construction of the Constitution can be regarded as settled, it is that which we now give to the word 'citizen' and the word 'people.'

"And, upon a full and careful consideration of the subject, the court is of opinion that, upon the facts stated in the plea in abatement, Dred Scott was not a citizen of Missouri, within the meaning of the Constitution of the United States, and not entitled as such to sue in its courts."

§ 637. Of the judges concurring in the decision, only Judge Daniel considered this question in his separate opinion. His argument (19 How. 475) is founded on the assumption that *citizen* must mean more than free inhabitant, native or naturalized, having a domicile. (See particularly p. 481.) The greater part of his argument is to the effect that a slave cannot be translated to the condition of citizen by the act of the master in manumission.<sup>2</sup> (Ib. 477-480.) Finally, said Judge Daniel, "The correct conclusions upon the question here considered would seem to be these: That in the establishment of the several communities now the States of this Union, and in the formation of

<sup>2</sup> Nothing in this Opinion is more remarkable than the presentation of the individuals of the white race as, together, constituting a political entity, while severally endowed with sovereignty as a personal right; of the idea that they are "citizens" and "the people," in virtue of this sovereign power, and that even without regard to their individual possession of the elective franchise; and of a "citizen race" of sovereigns, or sovereign race of citizens, with a "subject race" of persons who are not distinguishable from "property." In this respect many coincidences may be found between the opinions in this case and an article in the *Southern Quarterly Review* of April, 1854, Vol. IX. p. 311, on Lieber's Civil Liberty, by the late Judge McCord, of South Carolina.

<sup>3</sup> Judge Daniel referred to the Roman law. In addition to what has been said on that argument, *ante*, Vol. I. p. 214, may be noticed *Codez*, X. 40, 7. *Cives quidem origo, manumissio, allectio, vel adoptio; incolae vero domicilium facit.* Also, *Ulpiani Frag.* Tit. 1, *de Libertis*, 5. *Libertorum genera sunt tria; cives Romani, Latini Juniani, dediticiorum numero.* 6. *Cives Romani sunt liberti, &c.* Even while recognizing the law of the *Corpus Juris Civilis* to be against him, Judge Daniel arbitrarily sets it aside for the law of the Roman republic. 19 How. 478. The law of the Romans is of authority only as it has actually been adopted by modern nations (*ante*, Vol. I. pp. 29, 144), and it is the law of Justinian's time, rather than that of any earlier period, that has been so received. In selecting a period of its development favorable to his own theories, Judge Daniel illustrated the error of supposing the Roman law to have authority according to its intrinsic merit.



the Federal Government, the African was not deemed politically a person. He was regarded and owned in every State in the Union as property merely,<sup>1</sup> and as such was not and could not be a party or an actor, much less a *peer*, in any compact or form of government established by the States or the United States. That if, since the adoption of the State governments, he has been or could have been elevated to the possession of political rights or powers, this result could have been effected by no authority less potent than that of the sovereignty—the State—exerted [482] to that end, either in the form of legislation, or in some other mode of operation. It could certainly never have been accomplished by the will of an individual operating independently of the sovereign power, and even contravening and controlling that power. That so far as rights and immunities appertaining to citizens have been defined and secured by the Constitution and laws of the United States, the African race is not and never was recognized either by the language or purposes of the former; and it has been expressly excluded by every act of Congress providing for the creation of citizens by *naturalization*, these laws, as has already been remarked, being restricted to *free white aliens* exclusively.

“But it is evident that, after the formation of the Federal Government by the adoption of the Constitution, the highest exertion of the State power would be incompetent to bestow a character or status created by the Constitution, or conferred in virtue of its authority only. Upon those, therefore, who were not originally parties to the Federal compact, or who are not admitted and adopted as parties thereto, in the mode prescribed by its paramount authority, no State could have power to bestow the character or the rights and privileges exclusively reserved by the States for the action of the Federal Government by that compact.

“The States, in the exercise of their political power, might, with reference to their peculiar government and jurisdiction, guaranty the rights of person and property, and the enjoyment

<sup>1</sup> Seeming to mean that negroes were known only as property irrespective of any law making them slaves. So Judge Taney (19 How. 415), referring to law of Connecticut respecting negroes. *Ante*, p. 290.

of civil and political privileges, to those whom they should be disposed to make the objects of their bounty; but they could not reclaim or exert the powers which they had vested exclusively in the Government of the United States. They could not add to or change in any respect the class of persons to whom alone the character of citizen of the United States appertained at the time of the adoption of the Federal Constitution. They could not create citizens of the United States by any direct or indirect proceeding."<sup>1</sup>

§ 638. Judge McLean's conclusion (19 Howard, 531) that a native born negro domiciled in a State and of free condition under its local law is a citizen in view of the clause in the third Article, has been noticed in another place;<sup>2</sup> he does not allude to the clauses of the fourth Article. It is remarkable that the Judge recognizes the question to be, Who may be a citizen of a State? and not, Who may be a citizen of the United States? which last is that which the other Justices who examined this point would seem to have proposed to themselves, while examining the question whether Dred Scott was a citizen of Missouri. Judge McLean would probably determine the citizens of the United States by first determining who are citizens of a State; for on page 533 he says, "No person can legally be made a citizen of a State, *and consequently* a citizen of the United States, of foreign birth, unless he be naturalized under the acts of Congress."

§ 639. In this case Mr. Justice Curtis examined the question which he thus states (19 Howard, 571):—"The inquiry recurs, whether the facts, that he is of African descent, and that his parents were once slaves, are necessarily inconsistent with his own citizenship in the State of Missouri, within the meaning of the Constitution and laws of the United States.

"In *Gassies v. Ballou* (6 Pet. 761), the defendant was described on the record as a naturalized citizen of the United

<sup>1</sup> It will be noticed that Judge Daniel, like the Chief Justice (*ante*, pp. 293, 294), assumed a peculiar definition for *naturalization*, and ignored the fact that the question was, Who is citizen of a State?

<sup>2</sup> Vol. I. p. 436.



States, residing in Louisiana. The court held this equivalent to an averment that the defendant was a citizen of Louisiana; because a citizen of the United States, residing in any State of the Union, is, for purposes of jurisdiction, a citizen of that State. Now, the plea to the jurisdiction in this case does not controvert the fact that the plaintiff resided in Missouri at the date of the writ. If he did then reside there, and was also a citizen of the United States, no provisions contained in the Constitution or laws of Missouri can deprive the plaintiff of his right to sue citizens of States other than Missouri in the courts of the United States.

"So that, under the allegations contained in this plea, and admitted by the demurrer, the question is, whether any person of African descent, whose ancestors were sold as slaves in the United States, can be a citizen of the United States.<sup>1</sup> If any such person can be a citizen, this plaintiff has the right to the judgment of the court that he is so; for no cause is shown by the plea why he is not so, except his descent and the slavery of his ancestors.

"The first section of the second article of the Constitution [572] uses the language, "a citizen of the United States at the time of the adoption of the Constitution." One mode of approaching this question is, to inquire who were citizens of the United States at the time of the adoption of the Constitution.

Citizens of the United States at the time of the adoption of the Constitution can have been no other than citizens of the United States under the Confederation. \* \* \* \*

It may safely be said that the citizens of the several States were citizens of the United States under the Confederation. \* \* \* To determine whether any free persons, descended from Africans held in slavery, were citizens of the United States under the Confederation, and consequently at

<sup>1</sup> At the very beginning of the inquiry, Judge Curtis, like Judge Daniel and the Chief Justice, substitutes a search after the citizens of the United States, for the question, Who are citizens of a State? though he will distinguish these last in order to ascertain those first mentioned. The two other judges would, on the contrary, determine the citizens of the United States without regard to State citizenship.



the time of the adoption of the Constitution of the United States, it is only necessary to know whether any such persons were citizens of either of the States under the Confederation, at the time of the adoption of the Constitution. Of this there can be no doubt," &c.

On pp. 573, 574, Judge Curtis referred to the constitutional law of several of the States to show that free negroes were citizens of those States and electors at the time of the ratification of the Articles of Confederation,<sup>1</sup> as showing, "in a manner which no argument can obscure, that in some of the original thirteen States, free colored persons, before and at the time of the formation of the Constitution, were citizens of those States" (ib. p. 575), and proceeds:—

"The fourth of the fundamental articles of the Confederation was as follows:—'The free inhabitants of each of these States, paupers, vagabonds, and fugitives from justice, excepted, shall be entitled to all the privileges and immunities of free citizens in the several States.'

"The fact that free persons of color were citizens of some of the several States, and the consequence, that this fourth article of the Confederation would have the effect to confer on such persons the privileges and immunities of general citizenship, were not only known to those who framed and adopted those articles, but the evidence is decisive, that the fourth article was intended to have that effect, and that more restricted language, which would have excluded such persons, was deliberately and purposely rejected.

"On the 25th of June, 1778, the Articles of Confederation being under consideration by the Congress, the delegates from South Carolina moved to amend this fourth article, by inserting after the word "free," and before the word "inhabitants," the word "white," so that the privileges and immunities of

<sup>1</sup> Citing the language of Judge Gaston, in *State v. Manuel*, and the reference to it in *State v. Newsom*, *ante*, pp. 87, 88, notes. Judge Curtis considered the language of the Declaration of Independence of little importance as compared with these State constitutions, but expressed the opinion that the authors of that instrument did not intend to say "that the creator of all men had endowed the white race exclusively with the great natural rights" which it asserts. 19 How. 574, 575.

general citizenship would be secured only to white persons. Two States voted for the amendment, eight States against it, and the vote of one State was divided. The language of the article stood unchanged; and both by its terms of inclusion, "free inhabitants," and the strong implication from its terms of exclusion, "paupers, vagabonds, and fugitives from justice," who alone were excepted, it is clear that, under the Confederation, and at the time of the adoption of the Constitution, free colored persons of African descent might be, and, by reason of their citizenship in certain States, were entitled to the [576] privileges and immunities of general citizenship of the United States.

"Did the Constitution of the United States deprive them or their descendants of citizenship?"

"That Constitution was ordained and established by the people of the United States, through the action, in each State, of those persons who were qualified by its laws to act thereon, in behalf of themselves and all other citizens of that State. In some of the States, as we have seen, colored persons were among those qualified by law to act on this subject. These colored persons were not only included in the body of the people of the United States, by whom the Constitution was ordained and established, but in at least five of the States they had the power to act, and doubtless did act, by their suffrages, upon the question of its adoption. It would be strange, if we were to find in that instrument anything which deprived of their citizenship any part of the people of the United States who were among those by whom it was established.<sup>1</sup>

"I can find nothing in the Constitution which, *proprio vigore*, deprives of their citizenship any class of persons who were citizens of the United States at the time of its adoption, or who should be native-born citizens of any State after its adoption; nor any power enabling Congress to disfranchise persons born on the soil of any State, and entitled to citizenship of such State by its constitution and laws. And my opinion is, that, under the Constitution of the United States,

<sup>1</sup> Compare *ante*, p. 285, the passage in Judge Taney's opinion there noted.



every free person born on the soil of a State, who is a citizen of that State by force of its constitution or laws, is also a citizen of the United States.

"I will proceed to state the grounds of that opinion.

"The first section of the second article of the Constitution uses the language, 'a natural-born citizen.' It thus assumes that citizenship may be acquired by birth. Undoubtedly, this language of the Constitution was used in reference to that principle of public law, well understood in this country at the time of the adoption of the Constitution, which referred citizenship to the place of birth. At the Declaration of Independence, and ever since, the received general doctrine has been, in conformity with the common law, that free persons born within either of the colonies were subjects of the King; that by the Declaration of Independence, and the consequent acquisition of sovereignty by the several States, all such persons ceased to be subjects, and became citizens of the several States, except so far as some of them were disfranchised by the legislative power of the States, or availed themselves, seasonably, of the right to adhere to the British Crown in the civil contest, [577] and thus to continue British subjects. (*McIlvain v. Cox's Lessee*, 4 Cranch, 209; *Inglis v. Sailor's Snug Harbor*, 3 Peters, p. 99; *Shanks v. Dupont*, *ibid*, p. 242.)

"The Constitution having recognized the rule that persons born within the several States are citizens of the United States, one of four things must be true :

"*First*. That the Constitution itself has described what native-born persons shall or shall not be citizens of the United States ; or,

"*Second*. That it has empowered Congress to do so ; or,

"*Third*. That all free persons, born within the several States, are citizens of the United States ; or,

"*Fourth*. That it is left to each State to determine what free persons, born within its limits, shall be citizens of such State, and *thereby* be citizens of the United States.

<sup>1</sup> "No person except a natural-born citizen, or a citizen of the United States at the time of the adoption of this Constitution, shall be eligible to the office of President," &c.



“If there be such a thing as citizenship of the United States acquired by birth within the States, which the Constitution expressly recognizes, and no one denies, then these four alternatives embrace the entire subject, and it only remains to select that one which is true.

“That the Constitution itself has defined citizenship of the United States by declaring what persons, born within the several States, shall or shall not be citizens of the United States, will not be pretended. It contains no such declaration. We may dismiss the first alternative, as without doubt unfounded.

“Has it empowered Congress to enact what free persons, born within the several States, shall or shall not be citizens of the United States?

“Before examining the various provisions of the Constitution which may relate to this question, it is important to consider for a moment the substantial nature of this inquiry. It is, in effect, whether the Constitution has empowered Congress to create privileged classes within the States, who alone can be entitled to the franchises and powers of citizenship of the United States. If it be admitted that the Constitution has enabled Congress to declare what free persons, born within the several States, shall be citizens of the United States, it must at the same time be admitted that it is an unlimited power. If this subject is within the control of Congress, it must depend wholly on its discretion. For, certainly, no limits of that discretion can be found in the Constitution, which is wholly silent concerning it; and the necessary consequence is, that the Federal Government may select classes of persons within the several States who alone can be entitled to the political privileges of citizenship of the United States. If this power exists, what persons born within the States may be President or Vice-President [578] of the United States, or members of either House of Congress, or hold any office or enjoy any privilege whereof citizenship of the United States is a necessary qualification, must depend solely on the will of Congress. By virtue of it, though Congress can grant no title of nobility, they may create an oligarchy, in whose hands would be concentrated the entire power of the Federal Government.

"It is a substantive power, distinct in its nature from all others; capable of affecting not only the relations of the States to the General Government, but of controlling the political condition of the people of the United States. Certainly we ought to find this power granted by the Constitution, at least by some necessary inference, before we can say it does not remain to the States or the people. I proceed, therefore, to examine all the provisions of the Constitution which may have some bearing on this subject.

"Among the powers expressly granted to Congress is 'the power to establish a uniform rule of naturalization.' It is not doubted that this is a power to prescribe a rule for the removal of the disabilities consequent on foreign birth. To hold that it extends further than this, would do violence to the meaning of the term naturalization, fixed in the common law (Co. Lit., 8 a, 129 a; 2 Ves., sen., 286; 2 Bl. Com., 293), and in the minds of those who concurred in framing and adopting the Constitution. It was in this sense of conferring on an alien and his issue the rights and powers of a native-born citizen, that it was employed in the Declaration of Independence. It was in this sense it was expounded in the Federalist (No. 42), has been understood by Congress, by the Judiciary (2 Wheat., 259, 269; 3 Wash. R., 313, 322; 12 Wheat., 277), and by commentators on the Constitution (3 Story's Com. on Con., 1-3; 1 Rawle on Con., 84-88; 1 Tucker's Bl. Com. App., 255-259).

"It appears, then, that the only power expressly granted to Congress to legislate concerning citizenship, is confined to the removal of the disabilities of foreign birth.

"Whether there be anything in the Constitution from which a broader power may be implied, will best be seen when we come to examine the two other alternatives, which are, whether all free persons, born on the soil of the several States, or only such of them as may be citizens of each State, respectively, are thereby citizens of the United States. The last of these alternatives, in my judgment, contains the truth.

"Undoubtedly, as has already been said, it is a principle of public law, recognized by the Constitution itself, that birth on the soil of a country both creates the duties and confers the

rights of citizenship. But it must be remembered that, though [579] the Constitution was to form a Government, and under it the United States of America were to be one united sovereign nation, to which loyalty and obedience on the one side, and from which protection and privileges on the other, would be due, yet the several sovereign States, whose people were then citizens, were not only to continue in existence, but with powers unimpaired, except so far as they were granted by the people to the National Government.

“Among the powers unquestionably possessed by the several States, was that of determining what persons should and what persons should not be citizens. It was practicable to confer on the Government of the Union this entire power. It embraced what may, well enough for the purpose now in view, be divided into three parts. *First*: The power to remove the disabilities of alienage, either by special acts in reference to each individual case, or by establishing a rule of naturalization to be administered and applied by the courts. *Second*: Determining what persons should enjoy the privileges of citizenship, in respect to the internal affairs of the several States. *Third*: What native-born persons should be citizens of the United States.

“The first-named power, that of establishing a uniform rule of naturalization, was granted; and here the grant, according to its terms, stopped. Construing a Constitution containing only limited and defined powers of Government, the argument derived from this definite and restricted power to establish a rule of naturalization must be admitted to be exceedingly strong. I do not say it is necessarily decisive. It might be controlled by other parts of the Constitution. But when this particular subject of citizenship was under consideration, and, in the clause specially intended to define the extent of power concerning it, we find a particular part of this entire power separated from the residue, and conferred on the General Government, there arises a strong presumption that this is all which is granted, and that the residue is left to the States and to the people. And this presumption is, in my opinion, con-



verted into a certainty, by an examination of all such other clauses of the Constitution as touch this subject.

"I will examine each which can have any possible bearing on this question.

"The first clause of the second section of the third Article of the Constitution is: 'The judicial power shall extend to controversies between a State and citizens of another State; between citizens of different States; between citizens of the same State, claiming lands under grants of different States; and between States, or the citizens thereof, and foreign States, [580] citizens, or subjects.' I do not think this clause has any considerable bearing upon the particular inquiry now under consideration. Its purpose was, to extend the judicial power to those controversies into which local feelings or interests might so enter as to disturb the course of justice, or give rise to suspicions that they had done so, and thus possibly give occasion to jealousy or ill will between different States, or a particular State and a foreign nation. At the same time, I would remark, in passing, that it has never been held, I do not know that it has ever been supposed, that any citizen of a State could bring himself under this clause and the eleventh and twelfth sections of the judiciary act of 1789, passed in pursuance of it, who was not a citizen of the United States. But I have referred to the clause only because it is one of the places where citizenship is mentioned by the Constitution. Whether it is entitled to any weight in this inquiry or not, it refers only to citizenship of the several States; it recognizes that; but it does not recognize citizenship of the United States as something distinct therefrom.

"As has been said, the purpose of this clause did not necessarily connect it with citizenship of the United States, even if that were something distinct from citizenship of the several States, in the contemplation of the Constitution.<sup>1</sup> This cannot

<sup>1</sup> The clause whose "purpose" is here spoken of seems to be that in the third Article. But does the purpose of the clause in the fourth Article "necessarily connect it with citizenship of the United States?"—or so as to make it necessary to determine who are citizens of the United States before the provision can be applied? The condition of privilege which is produced by this provision, we may, if we choose, call citizenship of the United States. But that which is effect, only, of the clause, cannot be presupposed when the question is of the effect.

be said of other clauses of the Constitution, which I now proceed to refer to.

“ ‘The citizens of each State shall be entitled to all the privileges and immunities of citizens of the several States.’ Nowhere else in the Constitution is there anything concerning a general citizenship; but here, privileges and immunities to be enjoyed throughout the United States, under and by force of the national compact, are granted and secured. In selecting those who are to enjoy these national rights of citizenship, how are they described? As citizens of each State. It is to them these national rights are secured. The qualification for them is not to be looked for in any provision of the Constitution or laws of the United States. They are to be citizens of the several States, and, as such, the privileges and immunities of general citizenship, derived from and guaranteed by the Constitution, are to be enjoyed by them. It would seem that if it had been intended to constitute a class of native-born persons within the States, who should derive their citizenship of the United States from the action of the Federal Government, this was an occasion for referring to them. It cannot be supposed that it was the purpose of this Article to confer the privileges and immunities of citizens in all the States upon persons not citizens of the United States.

“ [581] And if it was intended to secure these rights only to citizens of the United States, how has the Constitution here described such persons? Simply as citizens of each State.”

Judge Curtis then observes that though the elective franchise is not essential to citizenship, its possession is a badge of citizenship, and that the Constitution has left the exercise of the franchise, even in electing officers of the national government, with the States. On the same page the argument proceeds:—

“ Laying aside, then, the case of aliens, concerning which the Constitution of the United States has provided, and confining our view to free persons born within the several States, we find that the Constitution has recognized the general principle of public law, that allegiance and citizenship depend on the place of birth; that it has not attempted practically to



apply this principle by designating the particular classes of persons who should or should not come under it; that when we turn to the Constitution for an answer to the question, what free persons, born within the several States, are citizens of the United States, the only answer we can receive from any of its express provisions is, the citizens of the several States are to enjoy the privileges and immunities of citizens in every State, and their franchise as electors under the Constitution depends on their citizenship in the several States. Add to this, that the Constitution was ordained by the citizens of the several States; that they were 'the people of the United States,' for whom [582] and whose posterity the Government was declared in the preamble of the Constitution to be made; that each of them was 'a citizen of the United States at the time of the adoption of the Constitution,' within the meaning of those words in that instrument; that by them the Government was to be and was in fact organized; and that no power is conferred on the Government of the Union to discriminate between them, or to disfranchise any of them—the necessary conclusion is, that those persons born within the several States, who, by force of their respective Constitutions and laws, are citizens of the State, are thereby citizens of the United States."

Judge Curtis then notices some objections.<sup>1</sup> In order to dis-

<sup>1</sup> 19 How. 532. "It may be proper here to notice some supposed objections to this view of the subject.

"It has been often asserted that the Constitution was made exclusively by and for the white race. It has already been shown that, in five of the thirteen original States, colored persons then possessed the elective franchise, and were among those by whom the Constitution was ordained and established. If so, it is not true, in point of fact, that the Constitution was made exclusively by the white race. And that it was made exclusively for the white race is, in my opinion, not only an assumption not warranted by anything in the Constitution, but contradicted by its opening declaration, that it was ordained and established by the people of the United States, for themselves and their posterity. And as free colored persons were then citizens of at least five States, and so in every sense part of the people of the United States, they were among those for whom and whose posterity the Constitution was ordained and established.

"Again, it has been objected, that if the Constitution has left to the several States the rightful power to determine who of their inhabitants shall be citizens of the United States, the States may make aliens citizens.

"The answer is obvious. The Constitution has left to the States the determination what persons, born within their respective limits, shall acquire (by birth) citizenship of the United States; it has not left to them any power to prescribe any rule for the removal of the disabilities of alienage. This power is exclusively in Congress.

"It has been further objected, that if free colored persons, born within a par-



tinguish them from the rest of the argument, the portion of the opinion containing the objections and replies is placed here in

ticular State, and made citizens of that State by its Constitution and laws, are thereby made citizens of the United States, then, under the second section of the fourth Article of the Constitution, such persons would be entitled to all the privileges and immunities of citizens in the several States; and if so, then colored persons could vote, and be [583] eligible to not only Federal offices, but offices even in those States whose Constitutions and laws disqualify colored persons from voting or being elected to office.

"But this position rests upon an assumption which I deem untenable. Its basis is, that no one can be deemed a citizen of the United States who is not entitled to enjoy all the privileges and franchises which are conferred on any citizen. See 1 Lit. Kentucky R. 326. [See *ante*, p. 16, note.] That this is not true, under the Constitution of the United States, seems to me clear.

"A naturalized citizen cannot be President of the United States, nor a Senator till after the lapse of nine years, nor a Representative till after the lapse of seven years, from his naturalization. Yet, as soon as naturalized, he is certainly a citizen of the United States. Nor is any inhabitant of the District of Columbia, or of either of the Territories, eligible to the office of Senator or Representative in Congress, though they may be citizens of the United States. So, in all the States, numerous persons, though citizens, cannot vote, or cannot hold office, either on account of their age, or sex, or the want of the necessary legal qualifications. The truth is, that citizenship, under the Constitution of the United States, is not dependent on the possession of any particular political or even of all civil rights; and any attempt so to define it must lead to error. To what citizens the elective franchise shall be confided, is a question to be determined by each State, in accordance with its own views of the necessities or expediencies of its condition. What civil rights shall be enjoyed by its citizens, and whether all shall enjoy the same, or how they may be gained or lost, are to be determined in the same way.

"One may confine the right of suffrage to white male citizens; another may extend it to colored persons and females; one may allow all persons above a prescribed age to convey property and transact business; another may exclude married women. But whether native-born women, or persons under age, or under guardianship, because insane or spendthrifts, be excluded from voting or holding office, or allowed to do so, I apprehend no one will deny that they are citizens of the United States. Besides, this clause of the Constitution does not confer on the citizens of one State, in all other States, specific and enumerated privileges and immunities. They are entitled to such as belong to citizenship, but not to such as belong to particular citizens attended by other qualifications. Privileges and immunities which belong to certain citizens of a State, by reason of the operation of causes other than mere citizenship, are not conferred. Thus, if the laws of a State require, in addition to [584] citizenship of the State, some qualification for office, or the exercise of the elective franchise, citizens of all other States, coming thither to reside, and not possessing those qualifications, cannot enjoy those privileges,—not because they are not to be deemed entitled to the privileges of citizens of the State in which they reside, but because they, in common with the native-born citizens of that State, must have the qualifications prescribed by law for the enjoyment of such privileges, under its Constitution and laws. It rests with the States themselves so to frame their Constitutions and laws as not to attach a particular privilege or immunity to mere naked citizenship. If one of the States will not deny to any of its own citizens a particular privilege or immunity, if it confer it on all of them by reason of mere naked citizenship, then it may be claimed by every citizen of each State by force of the Constitution; and it must be borne in mind that the difficulties which attend the allowance of the claims of colored persons to be citizens of the United States are not avoided by saying that, though each State may make them its citizens, they are not thereby made citizens

the note. After disposing of these objections, his conclusions are thus stated, on p. 588 of the report:—

of the United States, because the privileges of general citizenship are secured to the citizens of each State. The language of the Constitution is, 'The citizens of each State shall be entitled to all privileges and immunities of citizens in the several States.' If each State may make such persons its citizens, they become, as such, entitled to the benefits of this Article, if there be a native-born citizenship of the United States distinct from a native-born citizenship of the several States.

"There is one view of this Article entitled to consideration in this connection. It is manifestly copied from the fourth of the Articles of Confederation, with only slight changes of phraseology, which render its meaning more precise, and dropping the clause which excluded paupers, vagabonds, and fugitives from justice, probably because these cases could be dealt with under the police powers of the States, and a special provision therefor was not necessary. It has been suggested, that in adopting it into the Constitution, the words 'free inhabitants' were changed for the word 'citizens.' An examination of the forms of expression commonly used in the State papers of that day, and an attention to the substance of this Article of the Confederation, will show that the words 'free inhabitants,' as then used, were synonymous with citizens. When the Articles of Confederation were adopted, we were in the midst of the war of the Revolution, and there were very few persons then embraced in the words 'free inhabitants' who were not born on our soil. It was not a time when many, save the [585] children of the soil, were willing to embark their fortunes in our cause; and though there might be an inaccuracy in the uses of words to call free inhabitants citizens, it was then a technical rather than a substantial difference. If we look into the Constitutions and State papers of that period, we find the inhabitants or people of these colonies, or the inhabitants of this State, or Commonwealth, employed to designate those whom we should now denominate citizens. The substance and purpose of the Article prove it was in this sense it used these words; it secures to the free inhabitants of each State the privileges and immunities of free citizens in every State. It is not conceivable that the States should have agreed to extend the privileges of citizenship to persons not entitled to enjoy the privileges of citizens in the States where they dwelt; that under this Article there was a class of persons in some of the States, not citizens, to whom were secured all the privileges and immunities of citizens when they went into other States; and the just conclusion is, that though the Constitution cured an inaccuracy of language, it left the substance of this Article in the National Constitution the same as it was in the Articles of Confederation.

"The history of this fourth Article, respecting the attempt to exclude free persons of color from its operation, has been already stated. It is reasonable to conclude that this history was known to those who framed and adopted the Constitution. That under this fourth Article of the Confederation, free persons of color might be entitled to the privileges of general citizenship, if otherwise entitled thereto, is clear. When this Article was, in substance, placed in and made part of the Constitution of the United States, with no change in its language calculated to exclude free colored persons from the benefit of its provisions, the presumption is, to say the least, strong, that the practical effect which it was designed to have, and did have, under the former government, it was designed to have, and should have, under the new government.

"It may be further objected, that if free colored persons may be citizens of the United States, it depends only on the will of a master whether he will emancipate his slave, and thereby make him a citizen. Not so. The master is subject to the will of the State. Whether he shall be allowed to emancipate his slave at all; if so, on what conditions; and what is to be the political *status* of the freed man, depend, not on the will of the master, but on the will of the State, upon which the political *status* of all its native-born inhabitants depends. Under the Constitution of the United States, each State has retained this power of de-



"The conclusions at which I have arrived on this part of the case are:—

"*First.* That the free native-born citizens of each State are citizens of the United States.

"*Second.* That as free colored persons born within some of

termining the political *status* of its native-born [586] inhabitants, and no exception thereto can be found in the Constitution. And if a master in a slaveholding State should carry his slave into a free State, and there emancipate him, he would not thereby make him a native-born citizen of that State, and consequently no privileges could be claimed by such emancipated slave as a citizen of the United States. For, whatever powers the States may exercise to confer privileges of citizenship on persons not born on their soil, the Constitution of the United States does not recognize such citizens. As has already been said, it recognizes the great principle of public law, that allegiance and citizenship spring from the place of birth. It leaves to the States the application of that principle to individual cases. It secured to the citizens of each State the privileges and immunities of citizens in every other State. But it does not allow to the States the power to make aliens citizens, or permit one State to take persons born on the soil of another State, and, contrary to the laws and policy of the State where they were born, make them its citizens, and so citizens of the United States. No such deviation from the great rule of public law was contemplated by the Constitution; and when any such attempt shall be actually made, it is to be met by applying to it those rules of law and those principles of good faith which will be sufficient to decide it, and not, in my judgment, by denying that all the free native-born inhabitants of a State, who are its citizens under its Constitution and laws, are also citizens of the United States.

"It has sometimes been urged that colored persons are shown not to be citizens of the United States by the fact that the naturalization laws apply only to white persons. But whether a person born in the United States be or be not a citizen, cannot depend on laws which refer only to aliens, and do not affect the *status* of persons born in the United States. The utmost effect which can be attributed to them is, to show that Congress has not deemed it expedient generally to apply the rule to colored aliens. That they might do so, if thought fit, is clear. The Constitution has not excluded them. And since that has conferred the power on Congress to naturalize colored aliens, it certainly shows color is not a necessary qualification for citizenship under the Constitution of the United States. It may be added, that the power to make colored persons citizens of the United States, under the Constitution, has been actually exercised in repeated and important instances. (See the Treaties with the Choctaws, of September 27, 1830, art. 14; with the Cherokees, of May 23, 1836, art. 12; Treaty of Gualalupe Hidalgo, February 2, 1848, art. 8.)

"I do not deem it necessary to review at length the legislation [587] of Congress having more or less bearing on the citizenship of colored persons. It does not seem to me to have any considerable tendency to prove that it has been considered by the legislative department of the government, that no such persons are citizens of the United States. Undoubtedly they have been debarred from the exercise of particular rights or privileges extended to white persons, but, I believe, always in terms which, by implication, admit they may be citizens. Thus the act of May 17, 1792, for the organization of the militia, directs the enrollment of 'every free, able-bodied, white male citizen.' An assumption that none but white persons are citizens, would be as inconsistent with the just import of this language, as that all citizens are able-bodied, or males.

"So the act of February 28, 1803 (2 Stat. at Large, 205), to prevent the importation of certain persons into States, when by the laws thereof their admission is prohibited, in its first section forbids all masters of vessels to import or bring



the States are citizens of those States, such persons are also citizens of the United States.

"*Third.* That every such citizen, residing in any State, has the right to sue and is liable to be sued in the Federal courts, as a citizen of that State in which he resides.

"*Fourth.* That as the plea to the jurisdiction in this case shows no facts, except that the plaintiff was of African descent, and his ancestors were sold as slaves, and as these facts are not inconsistent with his citizenship of the United States, and his residence in the State of Missouri, the plea to the jurisdiction was bad, and the judgment of the circuit court overruling it was correct.

"I dissent, therefore, from that part of the opinion of the majority of the Court, in which it is held that a person of African descent cannot be a citizen of the United States."

§ 640. On this provision of the Constitution very little is to be found in the writings of the leading commentators. The remarks of Story and Kent, though brief, are often referred to, and require consideration. Story's, in Comm. (B. III. ch. 40),

'any negro, mulatto, or other person of color, not being a native, a citizen, or registered seaman of the United States,' &c.

"The acts of March 3, 1813, section 1 (2 Stat. at Large, 809), and March 1, 1817, section 3 (3 Stat. at Large, 351), concerning seamen, certainly imply there may be persons of color, natives of the United States, who are not citizens of the United States. This implication is undoubtedly in accordance with the fact; for not only slaves, but free persons of color, born in some of the States, are not citizens. But there is nothing in these laws inconsistent with the citizenship of persons of color in others of the States, nor with their being citizens of the United States.

"Whether much or little weight should be attached to the particular phraseology of these and other laws, which were not passed with any direct reference to this subject, I consider their tendency to be, as already indicated, to show that, in the apprehension of their framers, color was not a necessary qualification of citizenship. It would be strange if laws were found on our statute book to that effect, when, by solemn treaties, large bodies of Mexican and North American Indians, as well as free colored inhabitants of Louisiana, have been admitted to citizenship of the United States.

"In the legislative debates which preceded the admission of the State of Missouri into the Union, this question was agitated. Its result is found in the resolution of Congress, of March 2-5, 1821, for the admission of that State into the Union." (See *ante*, p. 168.) After reciting the facts, Judge Curtis adds:—"It is true, that neither this legislative declaration, nor anything in the Constitution or laws of Missouri, could confer or take away any privilege or immunity granted by the Constitution. But it is also true, that it expresses the then conviction of the legislative power of the United States, that free negroes, as citizens of some of the States, might be entitled to the privileges and immunities of citizens in all the States."

§§ 1805, 1806, are on the consequence and efficacy of the clause. They will be principally noticeable hereinafter, under the second inquiry; as he does not propose the question, Who are citizens? But his views on that point perhaps may be conjectured from what he here says. The first of these sections contains only an analysis of the corresponding provision in the Articles of Confederation, which is taken from the Federalist, and will be noticed hereafter. His original comment on this clause is in § 1806: "The provision in the Constitution avoids all this ambiguity [attributed to the Article of Confederation]. It is plain and simple in its language, and its object is not easily mistaken. Connected with the exclusive power of naturalization in the national government, it puts at rest many of the difficulties which affected the construction of the Article of Confederation. It is obvious that, if the citizens of each State were to be deemed aliens to each other they could not take or hold real estate or other privileges except as other aliens. The intention of this clause was to confer on them, if one may so say, a general citizenship; and to communicate all the privileges and immunities which the citizens of the same State would be entitled to under like circumstances." By his allusion to naturalization, and his contrasting these citizens with "other aliens," the author seems to indicate domicil and native birth, or naturalization, as the only requisites of citizenship.

§ 641. But, when considering the jurisdiction of the national courts, under Art. III. sec. 2, the same author remarks, Comm. (B. III. c. 38), § 1693: "The next inquiry growing out of this part of the clause is, Who are to be deemed citizens of different States within the meaning of it? Are all persons born within a State to be deemed citizens of that State, notwithstanding any change of domicil?" Here the author evidently assumes that *citizen* in this clause is only equivalent to *native or naturalized inhabitant having a domicil*. But he answers the inquiry by referring to the clause in the fourth Article—"The answer to this inquiry is equally plain and satisfactory. The Constitution having declared that 'the citizens of each State shall be entitled to the privileges and immunities of citizens in the several States,' every person who is a citizen of one



State, and removes into another with the intention of taking up his residency and habitation there, becomes *ipso facto* a citizen of the State where he resides; he then ceases to be a citizen of the State from which he has removed his residence. Of course, when he gives up his new residence or domicile, and returns to his native or other State residence or domicile, he re-acquires the character of the latter. What circumstances shall constitute such a change of residence or domicile, is an inquiry more properly belonging to a treatise upon public or municipal law than to commentaries upon constitutional law." In the continuation of the section the author gives a brief description of the nature of domicile as usually understood.

This is equivalent to saying that the clause in the fourth Article shows that the citizenship which depends upon domicile is determined by the intention to assume a residence, formed by the citizen who removes. But if the conclusion here attributed to the fourth Article is presented as a complete answer to the question—Who are citizens of a State?—arising under the third Article, then it is really founded on an assumption that *citizens* and *native or naturalized inhabitants having a domicile* would be convertible terms in either Article; and the circumstances determining domicile in a State are then settled by the ordinary juridical definition. Thus the author views the clause in the fourth Article as simply giving a right of inter-immigration to the *domiciled inhabitants, native or naturalized*, of each State. But before attributing this consequence to this clause, the value of the term *citizen* in that place should have been independently ascertained.

But if *citizen* in this clause indicates one in a condition of privilege and immunity not necessarily belonging to every domiciled inhabitant of a State, it obviously cannot be said that, because those who are citizens in this sense may become domiciled inhabitants of any other State, as incident to the privilege and immunity of citizen in such State, therefore any domiciled inhabitant, native or naturalized, of a State, may become such in every other State.

§ 642. Kent's observations are, in like manner, indeterminate by not fixing the sense of the word *citizen*. He says, 2



Comm. 71, that the clause in the fourth Article "applies only to natural-born or duly naturalized citizens." It must, however, be assumed, as by Story, in the remarks just cited, that here "the citizens of each State" must be persons who have at least a domicile in some one State; that while it is admitted that they must be subjects of the United States by birth or naturalization, the fact of domicile in a State is the more essential characteristic. The question is, whether this is the only essential characteristic in the case of native or naturalized inhabitants. The commentator would, from the sentence quoted, appear to hold the affirmative. He proceeds to say: "And if they remove from one State to another, they are entitled to the privileges that persons of the same description are entitled to in the State to which the removal is made and to none other." If the words "same description" refer to the qualitative words "natural-born or duly naturalized citizens," then by "the citizens of each State" the commentator understood all domiciled inhabitants, native or naturalized. But, in the next sentence, "the qualifications of citizens" are spoken of as something beyond those given by birth and domicile, and as fixed either by the "policy" of the State of domicile, or by that of the State into which the person may remove. The author says: "The laws and usages of one State cannot be permitted to prescribe qualifications for citizens to be claimed and exercised in other States in contravention to their local policy." This might be construed to mean that each State (in view of persons entering its limits) is to judge who are "citizens of each State"—each other State—or the persons intended by this clause. But more probably the author intended "qualifications of citizens" to refer to the degree of privilege the persons designated should enjoy in "every other State" by force of the last part of the clause. His views on this point will be considered hereinafter. From the whole it may be inferred that in his view any domiciled inhabitant of a State, native or naturalized, is included under "the citizens of each State" in the fourth Article, and that, thereby, any such persons have at least the right to remove to another State and become domiciled inhabitants therein.

§ 643. The conclusion of the same author in the note to 2 Comm. 256, is more definite as to the extent of this clause to persons of color, though his language illustrates the necessity of defining the word *citizen*. After mentioning some of the State laws placing free blacks in an inferior condition, and some which prohibit their immigration, and some authorities against their being considered "citizens of a State," he remarks: "If, at common law, all human beings born within the liegeance of the king, and under the king's obedience, were natural-born subjects and not aliens, I do not perceive why this doctrine does not apply to these United States, in all cases in which there is no express constitutional or statute declaration to the contrary. Blacks, whether born free or in bondage, if born under the jurisdiction and allegiance of the United States, are natives and not aliens. They are what the common law terms natural-born subjects. Subjects and citizens are in great degree convertible terms as applied to natives."

So far as *citizen* is merely opposed to *foreigner* or *alien*, *natural-born subject* and *citizen* are terms fully convertible. And so the terms are ordinarily used in works on international law. But the question is, whether *citizen* is here used in this sense only, or refers to that condition which exists under the internal law of some one country. In a sentence preceding the above citation, the author remarks: "Perhaps, after all, the question depends more on a verbal than on an essential distinction." But, in law, words are things, and words being used to determine essential relations, a verbal distinction is an essential distinction. When used to discriminate the native or naturalized inhabitants of distinct national jurisdictions the terms are commonly equivalent. But *citizen* may also be used without exclusive reference to that distinction, and with regard to internal laws establishing different conditions of privilege among the domiciled subjects of the state. This provision is *quasi*-international in effect as between the several States; but still it is the law of one nation; so that it may be a question whether persons are here called *citizens* in reference to that relation in which they are principally contrasted with persons

subject to other jurisdictions, or so called as possessing a certain degree of privilege under the internal law.

If these terms are not fully but only in a degree "*convertible*," the question occurs as to degree in this instance. The next sentence in Kent's note shows that the different uses of the word are to be determined by the connection in which it stands,—“ And though the term *citizen* seems to be appropriate to republican freemen, yet we are all, equally with the inhabitants of other countries, *subjects*; for we are all bound by a 'legiance and subjection to the government and law of the land.' The privilege of voting, and the legal capacity for office, are not essential to the character of a citizen,—for women are citizens without either, and free people of color may enjoy the one, and may acquire, and hold, and devise, and transmit by hereditary descent, real and personal estates.”

From the remainder of the note, Kent's opinion seems to have been that, though *citizen* is not here simply equivalent to *subject*, the only distinction between those domiciled inhabitants, native or naturalized, who are citizens, and those who are not, is in the quality of free as opposed to bond condition.\*

§ 644. An examination, independent of authority, will here be attempted, of the question arising under the first part of the clause,

What is the personal extent of the terms, *the citizens of each State*? or who are the persons thereby intended?

Assuming, on the reasons and authorities already presented, that only those persons can be intended who are inhabitants of a State, native or naturalized under an act of Congress,<sup>1</sup>

The first inquiry is—whether all such persons are included in the descriptive terms, or whether they refer to a portion standing in a certain privileged relation toward the supreme power of the State?

If the latter is the true conclusion,

A second inquiry is—whether the possession of the char-

<sup>1</sup> Compare *ante*, p. 271, note.

<sup>2</sup> So far as Kent and Story express an opinion, they support that interpretation of citizen in the third Article, which was hereinbefore maintained, Vol. I., p. 436.

<sup>3</sup> *Ante*, p. 277.



acter of citizen of a State is determined by the law of the State of domicil, or depends on some national or common standard?

The inhabitants of the United States are subject both to the powers held by the national government and to those held by the several State in which they may be domiciled. But the persons here indicated by the terms, "the citizens of each State," are called citizens of, and in respect to, the State of which they are domiciled inhabitants, not in respect to that national sovereignty in reference to which, also, they have a domicil, and to whose authority, in the same State, they are also at the same time subject, though in different relations. This construction the phraseology and the whole connection seem obviously to require.<sup>1</sup> Now the question is,—whether the persons to be recognized are determined solely by the juridical act of the State of domicil, or whether there is some common limitation of the personal extent of the words so that, even though the persons are called *citizens of a State* in a relation towards that State, the possession of the character of citizen of such State, so far as it is to be recognized in other States under this provision, is not altogether dependent on the will of such several State? It has already been shown that the terms here used to express the common intent of the parties, must be interpreted according to the anterior use of such terms by the same parties; that the same rule applies in the interpretation of the legislation of any one state, in which case it derives its authority from the single authority of such state, and therefore it is applicable to the Constitution regarded as the act of the integral people; but that, in its present application, the force of the rule is ascribed to that usage of nations in their reciprocal action which originates "the positive or practical law of nations."<sup>2</sup>

This former use of words by the constituent parties can only be found in the enunciation of law which had had international effect among the States and colonies. But whether

<sup>1</sup> This seems to be recognized by the judges of the Supreme Court whose opinions in Dred Scott's case have been cited, in the commencement of their inquiry, though they all lose sight of it in their reasonings.

<sup>2</sup> *Ante*, Ch. xx.

the law which had this effect rested on the authority of the empire or nation and had a national extent, or rested on the several authority of a colony or a State and had only local extent, it must in a great degree have been identified with the international usage of all civilized nations. The use of terms by the constituent parties, in this branch of jurisprudence, is therefore in a great degree identified with the use of such terms in the general international law of civilized nations.

§ 645. The *meaning* of the term citizen (the subject of the first inquiry above stated) must be supposed to be one received in the several States, since the mere signification of terms must be supposed to be one commonly known to all the constituting parties. But it does not appear that, for any similar reason, the *personal extent* of the term in this clause (the subject of the second inquiry), though with that extent the term is used in expressing a common rule of action, should be one adopted by each State, or even by any one State, in its several juridical action.<sup>1</sup>

The various possible meanings of *citizen* in this clause have been indicated with reference to those definitions or fundamental relations which make the natural or necessary law of nations.<sup>2</sup> If the ordinary juridical use of the term by the declaring party or parties, the States or the people of the United States, had not been sufficiently uniform to indicate the particular meaning of the term in this case, reference must be had to the usage and practice of nations in similar international relations to determine the particular meaning here intended.

If the term *citizen* is taken in the sense of domiciled inhabitant, native or naturalized, under a law of Congress, there can be little or no controversy as to its personal extent; for the facts constituting domicile are so settled in the national recognition of civilized nations that they must be assumed to be the same in the local law of every several jurisdiction within the United States.

<sup>1</sup> So though "privileges and immunities of citizens," in the last part of the clause, are received by the constituent parties as a measure of franchises in a common rule, it does not appear that the standard of citizenship, as a condition of privilege and immunity, should be that adopted in the internal law of each State or of any State.

<sup>2</sup> *Ante*, §§ 627-631.



But if the term is taken in the enlarged sense, with limited personal application, having different personal extent in different States, it seems necessary to interpret the whole clause, as above supposed, with reference to the usage and practice of nations in applying statutes or compacts affecting private persons in international relations like those contemplated in this provision, in order to determine the personal extent of the word in this clause; that is, whether each State is to determine the extent of the word, as applicable to its own domiciled inhabitants, or whether there is a national or common standard of the personal extent of the term among the inhabitants of the States.

If, therefore, there is any criterion of the meaning of the terms, other than their anterior ordinary juridical use by the same parties, which, under rules of interpretation or construction, may be resorted to in either of these inquiries (i. e., 1, as to the meaning of the term; 2, as to its personal extent); that criterion is the same in either instance, viz.: the juridical practice of nations in allowing or disallowing within their several jurisdictions the rights and privileges attributed to alien persons under the law of their domicile.

§ 646. The possession of that degree of civil privilege which constitutes the citizen, in that sense of the word and of its cognates in which it is distinguished from the term *subject*, is determined by the internal law of some one state<sup>1</sup> and, except as identified with the term *subject*, the word *citizen* is not now a term employed in the international law. An international recognition of distinctive conditions of civil privilege may be traced in the history of the jurisprudence of the Roman republic and empire. Admitting that no international law, in the modern sense of an ascertained code of imperfect sanction for independent nations, could have been recognized under the Roman empire,<sup>2</sup> still a *quasi*-international private law, being

<sup>1</sup> *Ante*, § 627.

<sup>2</sup> *Ante*, Vol. I. p. 147. The reasons for commencing an inquiry of this sort by referring to the Roman law, have been explained. Vol. I. p. 144. That law is often spoken of as the source of the modern international public law. See 1 Kent's Comm. 7. But it is so only by being an exponent of universal jurisprudence. See H. S. Maine's *Ancient Law* (London, 1861), p. 101, and the whole 4th chapter of that work.



law in the strict sense with international effect, must at one time have existed, and must have been shown in the recognition of *personal* laws, so called, or in the personal extent given to the laws of an alien's domicil determining his status or condition.<sup>1</sup> The various degrees of civil privilege ascribed to persons domiciled in Rome itself, distinguishing them as *cives Romani*, *Latini*, *perigrini*, *libertini*, &c., would necessarily be recognized in the colonies and provinces, where similar distinctions must also have existed which had in some degree a similar international recognition throughout the empire. The character of citizen, in that sense of the term which implies the possession of privileges not necessarily incident to the character of free subject, or inhabitant of free condition, must have been thus internationally recognized for a long period under the Roman dominion.<sup>2</sup> At this time the distinction between *citizens* and *subjects* may be said to have existed in the international law, but continued to become less marked, until the peculiar character of citizenship, in distinction from the condition of subject, became lost under Justinian, after which time no differences of civil condition were maintained under the private international law, except in the universal recognition of conditions of personal freedom and of personal or chattel slavery.<sup>3</sup>

When the feudal system had brought new forms of civil life in place of those which had existed under the declining empire, a new class of personal distinctions, congenital with the relations of lord and vassal, freeman and villain became known under the various municipal (internal) laws of Europe, and later, in the mediæval period, citizenship again became a condition distinguishable from that of the simple subject. It consisted then, as in the Roman law at first, in the possession of franchises of a local character. The various conditions of vassalage were the incidents of relations of persons to other persons in respect to particular things and places, and such as could not be continued under other jurisdictions. The condition of a citizen or burgher was exhibited in relations which could exist

<sup>1</sup> *Ante*, § 107.

<sup>2</sup> See *Colonia*, *Civitas*, *Provincia*, in Smith's Dict. of Antiquities.

<sup>3</sup> *Ante*, § 206, and notes.

only in particular places and spheres of action. Except under that limited application of the ancient *jus gentium* which obtained in respect to the native races of Africa and America, no status or personal condition, not included under the relations of family, was internationally supported by universal jurisprudence.<sup>1</sup> But, even when international private law existed only in some usages of commercial intercourse and in some of the rules of chivalry, there was yet a very general international recognition of all the feudal conditions, so far as they did not consist in relations of persons to other persons in respect to land or the products of land.<sup>2</sup>

It would seem that at an early period of modern European history, aliens to the forum were so far distinguished in condition according to the laws of their domicil as to induce writers on this subject at a later period to declare, as a rule of customary law derived *a posteriori* from the anterior juridical practice of European states, that personal laws, including laws of status, were to be everywhere internationally recognized.

That proposition has not herein been recognized as a proper statement of the principle regulating, as between independent nations, the extension of laws affecting personal condition.<sup>3</sup> Yet the fact of its having obtained currency sufficiently proves that, while the internal law of the several countries of western Europe supported marked distinctions in personal privilege, and while the possession of those civil rights which constitute citizenship, in the enlarged sense, was not under those laws attributed to all domiciled persons, nor even to all who enjoyed the right of personal liberty, there was at the same time an international discrimination of persons before domiciled in other countries, as possessing or not possessing those rights which constitute the condition of a *citizen* as distinguished from the simple condition of the subject.

It might then be inferred that the term *citizen*, if employed

<sup>1</sup> *Ante*, §§ 167, 168.

<sup>2</sup> Wildman's International Law, 3. The author, after distinguishing the *law of nations* of the Romans as being universal jurisprudence, says:—"In the same sense the feudal system has been designated the law of nations of the Western World," i. e., western Europe. The Danish Laws of Christian V. B. 3, c. 2, s. 2, declares "foreign nobles to enjoy the privileges of Danish nobility."

<sup>3</sup> *Ante*, § 107.



at that time in statutes or treaties, was to be interpreted either in the sense of *subject* or in the enlarged sense, according to the anterior prevalence of personal distinctions in respect to the enjoyment of civil rights under the juridical power of the constituent or legislating party or parties. It may be said that, if used with reference to aliens in the several legislation of any one state, it could not be equivalent to the term *subject*; if such state had before, either by positive legislation or unwritten law, discriminated between alien persons in the possession of those rights which constitute citizenship as contrasted with simple subjection, and that, as between countries which had before maintained such distinctions in their respective laws, the term, in a compact, would not be synonymous with domiciled subject, native or naturalized, until each state had so extended the possession of civil rights among its domiciled inhabitants that in its internal law *citizen* and *subject* were convertible terms. While personal laws were distinguishable in the internal jurisprudence of a country; while men were distinguished in it as persons and as property, or as lords and vassals, or as freemen and bondmen, or as freemen by the public and private law, having civil or political and civil franchises, and men of free condition liable in a different degree to personal disabilities under the private law, whose rights had no guarantee in the public law of the state (supposing the state to be republican in constitution), *citizen* and *subject* would not be equivalent and convertible terms in its separate legislation, whether the domiciled inhabitants, or aliens—persons before domiciled in other jurisdictions—were intended. So, in the joint or reciprocal legislation of two or more states which had before admitted such a distinction of conditions under their respective laws, the term *citizen* would judicially be held to apply, at the farthest, only to those subjects of either who by the law of their domicile were invested with those privileges and immunities which by that law might constitute citizenship in the sense of a condition of civil franchise beyond that necessarily incident to the condition of a *subject*.

§ 647. Citizenship, in this sense of the word, cannot be attributed in any forum of jurisdiction to alien persons without



recognizing the law of their domicile as the juridical source from which that condition of privilege proceeds. It must, for the greater part at least, be attributed to the *particular law*, *jus proprium* of some one country.<sup>1</sup> But it might, in some of its incidents, be founded on principles more generally recognized, and distinctions among natural persons, as capable or not capable of such citizenship, might be attributed to universal jurisprudence. When various degrees of civil privilege were internationally recognized in the different provinces under Roman dominion, they were ascribed to the central or imperial legislative authority rather than to that of some country or province in which the persons to whom they were attributed had a domicile. They had, in this, something of the character of conditions resting on the *jus gentium*. It has been seen that the doctrine of the liability or capacity of persons of the negro and other races to chattel slavery had been ascribed to universal jurisprudence, and it has been suggested, in another chapter, that the attribution to such persons of a disability or inferiority as compared with others in respect to civil rights and privileges, might, by its general recognition, have acquired the same character.<sup>2</sup>

The principles of universal jurisprudence may take effect as private law—that is, establish relations between private persons. But since such principles form the only standard of natural reason to which nations can refer as to a law of external authority, they must be presumed to have been understood in international compacts affecting relations of private persons, and therefore they will apply to the construction of such compacts, when not definitely rejected by express provision.

The personal distinction between the negro and Indian races and the European or white is the most marked of any that have affected the possession of civil rights under the juridical power of civilized nations. It has been already shown that in many different jurisdictions it has been recognized in laws limiting the admission of aliens to political and civil rights. This distinction has been principally operative in the interna-

<sup>1</sup> *Ante*, § 152.

<sup>2</sup> *Ante*, § 327.

tional relations of Europeans since the discovery of America and the local laws of the new states founded there by them. But a similar distinction restricting persons of other races in respect to the enjoyment of civil franchises may be found in the laws of European countries. The disabilities of persons of Hebrew race who adhered to their ancient creed, and of persons of the race called, in English, the Gipsy, have been maintained in the law of every European nation.<sup>1</sup> Their status of civil disability may be said, from its general enforcement, to have been a doctrine of the *jus gentium* for those countries since the Christian era. There is no doubt but that, as between European states, they would have been judicially held until a comparatively recent period to modify the personal extent of the term *citizen* or any other which might have been used in an international compact to indicate persons who, within the jurisdiction of any one of the contracting parties, were to be recognized not merely as subjects of the other party but as subjects possessing a certain degree of civil privilege, and that any such state would not have hesitated to discriminate the subjects of another according to these distinctions of race; although by the law of their domicile those before subject to these disabilities had been fully emancipated and vested with the rights and privileges incident to citizenship in the enlarged sense. At least, while these disabilities continued to be maintained by the internal law of either state in the case of its domiciled subjects being of those races, the personal distinctions which had formerly been of universal prevalence would have been applied by such state to interpret a treaty which should refer to a class of the subjects of each as persons who, within the jurisdiction of the other, were to be recognized not merely as subjects of the state in which they were domiciled, but as persons possessing a certain degree of civil privilege.

<sup>1</sup> The first article in the edict of Louis XIV., of 1724, commonly known as the Code Noir of Louisiana, decrees the expulsion of Jews from the colony; all the other articles relate to negroes and slaves. In *Wells v. Williams*, 1 Ld. Raymond 282:—"A Jew may sue at this day; but heretofore they could not, for they were looked upon as enemies." (Cited *arguendo* in *Shaw v. Brown*, 35 Mississippi, 299.) Molloy *De Jure Maritimo* (1744), B. III. c. 6; of the Jews. In Prussia, Jews are, or were recently, excepted in the law of naturalization. 1 Phillimore's *Int. Law*, 352.



§ 648. These considerations may justify the conclusion that both to determine the meaning of the term *citizens of each State* in this clause, and also the personal extent of the designation, if it is taken to indicate inhabitants of a State who enjoy a particular degree of civil privilege, it may be construed with reference to the anterior action of the constituent parties in discriminating between foreign and domestic aliens in respect to the enjoyment of civil franchises according to personal distinctions, having herein special regard to those which may have been judicially attributed to universal jurisprudence.

§ 649. The law, having international effect, which resulted from the juridical action of those who preceded the authors of the Constitution, has been shown to have been in part a national law, resting on a national authority, having a *quasi*-international extent, and partly local law, resting on the several authority of a colony. So far as the rights which the common law attributed to the subject of European race in America were such as constituted the civil franchises of a citizen (and they may be said to have been such, if the British-born subject was a citizen independently of any political qualifications), the condition of a citizen was recognized, as a superior condition to that of a simple subject of the British empire, under the law having *quasi*-international effect in the several jurisdictions of which it was composed.

If the political franchises of any subjects of the empire were sustained by the law of national authority and *quasi*-international effect, it was only in the case of persons who also held their civil privileges under the law of the same authority and effect.

If similar rights were in any several jurisdiction of the empire attributed to any other persons, on appearing therein as aliens, it was under a law of local authority.

Civil citizenship, then, if not sustained by the common law of England operating with personal extent, was dependent for its international recognition on the several juridical will of each colony or separate jurisdiction. Whether citizenship, as the condition of a domiciled inhabitant, was or was not, in every several jurisdiction of the empire, enjoyed exclusively



by persons of European race, it appears that, if enjoyed in any one such jurisdiction by a domiciled inhabitant of negro or Indian race, it had no recognition in any other such jurisdiction under the law of national authority and extent, and that there is no historical evidence of its having been definitely recognized in any colony in the case of persons of those races who might have enjoyed citizenship in some other jurisdiction.<sup>1</sup>

It does not appear that during the colonial period *British subject* and *British citizen* were equivalent terms in juridical use in any part of the empire; unless, perhaps, in the British islands in speaking of British subjects actually within the limits of the four seas.

It has been shown that there was nothing in the political events accompanying the Revolution and preceding the establishment of the Constitution to change the anterior personal condition under private law of any of the inhabitants of the several States, or at least nothing to alter the relative territorial or personal extent of antecedent laws, since the power of the States over the condition of private persons rather became thereby more isolated and independent in those relations which depend on private law,<sup>2</sup> and it has been seen from the course of legislation from the date of the establishment of the independence of the United States to the adoption of the Constitution that the former laws of personal condition continued to exist with very little change, in all the States during that time, except in the case of Massachusetts and Vermont. In these States the ancient distinction between their domiciled inhabitants in respect to capacity for civil and political rights may have been partially or even altogether abolished before the adoption of the Constitution, and it may be that no distinction would have been made between aliens of different races in respect to their enjoyment of the privileges and immunities of citizenship. But a recent abandonment of the distinction in the law of one or two States would hardly have the effect of altering the significancy of words in an international compact,

<sup>1</sup> *Ante*, §§ 326, 327.

<sup>2</sup> *Ante*, §§ 433-436.

and that too while, in all the States, social discriminations maintained the spirit of the former legal distinction.

§ 650. If then the anterior juridical action of the constituent parties may be referred to, in interpreting the meaning of the terms used, it would seem to indicate that the persons designated "the citizens of each State," in this clause of the fourth Article,<sup>1</sup> are not all who under the internal law of a State possess the rights of citizenship, even in the sense of a condition of privilege superior to that of simple domiciled inhabitant native or naturalized under a law of Congress, but that the extent of the term must be confined to free persons of the European or white race.

§ 651. In the preceding pages it has been attempted to interpret the several terms, the meaning of which is here in question, by the former juridical action of the constituent parties and their political predecessors.

Perhaps it may be possible to distinguish this from *construing the whole enactment* by the intention of the parties in this particular instance, or by ascertaining the spirit and reason of this provision, irrespectively of the conclusions drawn from the words themselves when interpreted or construed as above attempted.

If such distinction can be made, it seems that such intention, or such spirit and reason, can only be known by other acts of the same parties or their representatives which are more nearly contemporaneous with this provision and have a more direct connection with the relations which are its subject matter than was that general course of juridical action which has already been referred to as a means of interpreting or construing the words here employed.

<sup>1</sup> The conclusion here presented is supposed not to be inconsistent with the opinion that, in the third Article, *citizen of a State*, means simply a legal person, native or naturalized, domiciled in some State. (*Ante*, § 372.) It is not a received principle that a word occurring in different places in the same instrument is always to be understood in the same sense. Story, in his rules of interpreting the Constitution, Comm. § 454, says:—"It is by no means a correct rule of interpretation to construe the same word in the same sense wherever it occurs in the same instrument." The whole section is important in these inquiries. Vattel, L. ii., c. 17, § 281:—"We are to take expressions which are susceptible of different significations, in each article, according as the subject requires—*pro substrata materia*—as the masters of the art say." Lieber's Herm. 119:—"We are by no means



It is very obvious that the intention of a lawgiver or the reason and spirit of his enactments will always be differently understood according to different preconceived views in the minds of the inquirers as to what that intention or reason and spirit ought to have been.<sup>1</sup>

Among the indications of the intention of the legislator in any particular enactment, must be the previous action of the same legislator in reference to the same topic of law or similar relations.<sup>2</sup>

§ 652. The Articles of Confederation, which rested on a sovereignty identical in its ultimate basis, if not in its political form,<sup>3</sup> with that by which the Constitution was established, contain a provision concerning this same international relation<sup>4</sup> between the States and their respective inhabitants, the wording of which is essentially different. The provision, which is in the fourth Article, has been already quoted.<sup>5</sup> From the use of the adjective "free," in connection with "inhabitants" and "citizens" in the first proposition contained in this Article, it would seem that the only distinction, in respect to international privilege, intended was founded on the possession or non-possession of personal freedom; that while all free domiciled inhabitants of a State, paupers, &c., excepted, were to possess the rights of free citizens in the several States, whatever these might have been, "the people" generally, meaning all the domiciled inhabitants of a State, should have a distinct degree of this international privilege not in itself equivalent to "the privileges and immunities of free citizens in the several States."<sup>6</sup>

bound to take an ambiguous word in that meaning in which it may occur in another passage of the same text; for words, as it is well known, have different meanings in different contexts." The question occurs, indeed, Is the word ambiguous?

<sup>1</sup> Lieber's *Hermeneutics*, 127.

<sup>2</sup> This may not be easily distinguishable from that *interpretation of the terms* from the former juridical action of the parties which has herein been already attempted. The construction now tried may perhaps be described as a comparison of the effect of the words of the enactment whose meaning is in question (as that effect has been understood by interpretation) with the effect of words of enactments *in pari materia* (as that effect may be understood by interpretation).

<sup>3</sup> *Ante*, § 345.

<sup>4</sup> *Ante*, § 485.

<sup>5</sup> *Ante*, p. 3, note.

<sup>6</sup> Compare Curtis, J., 19 How. 575, and Ch. J. Taney, *ib.* 418, *ante*, pp. 302, 293. Judge Taney says, "It is very clear that, according to their accepted meaning that day, the words 'free inhabitants,' notwithstanding their generality, did not include the African race, whether free or not; for the fifth section of the ninth



It is important in this connection to notice that aliens may either appear within the forum as persons proposing to assume the condition of domiciled inhabitants, relinquishing thereby any claim to the continuance of a class of rights held by them under the local law of their former domicile which they might have retained in the forum had they appeared therein as temporary residents; or they may appear in this latter character, claiming, by international law and as aliens to the forum, rights conferred by the law of a country they have temporarily left, and in which they have still their domicile.

The domiciled inhabitants of one of the several States may appear within the territory of another State in either of these characters. Perhaps this Article of Confederation is to be read in view of this distinction, and it may be concluded that it was framed with special reference to the existence of slavery, and the intention was to discriminate in the international obligations of the States in reference to the inhabitants of any one State; so that while to each of "the free inhabitants," whether white or black, the right was secured of becoming at least a domiciled inhabitant of any State, slaves could only pass from one to the other as aliens; while their permanent location in the State into which they should come or be brought would depend upon the subsequent determination of such State, untrammelled by this provision.<sup>1</sup>

Article provides that Congress should have the power "to agree upon the number of the land forces to be raised, and to make requisitions from each State for its quota in proportion to the number of *white* inhabitants in such State," &c. The only inference, in most minds, from the use of "*free* inhabitants" in one place, and "*white* inhabitants" in another, would be that the first term would include inhabitants not white. But the Chief Justice says, "Words could hardly have been used which more strongly mark the line of distinction between the citizen and the subject; the free and the subjugated races. The latter were not even counted when the inhabitants of a State were to be embodied in proportion to its numbers for the general defence. And it cannot for a moment be supposed that a class of persons thus separated and rejected from those who formed the sovereignty of the States, were yet intended to be included under the words 'free inhabitants' in the preceding Article, to whom privileges and immunities were so carefully secured in every State." This reasoning, if admissible, is so only in the doctrine of construction by the intention of the lawgiver learned *aliunde*, stated in the last section. Compare the Judge's argument from the militia laws, *ante*, p. 290, note.

<sup>1</sup> In this view, the language of this Article of Confederation is not so inconsistent or difficult of interpretation as has been supposed in Letter No. 42 of the Federalist, and by Judge Story, who adopts the language of that letter. Comm. § 1805. "It was remarked by the Federalist that there is a strange confusion in this language. Why the terms *free inhabitants* are used in one part of the article, *free*

If the above is the true meaning of the Article of Confederation, it would be impossible, by any definition of the term "citizen" in the fourth Article of the Constitution, to make the effect of the latter equivalent to that of the Article of Confederation. For if *citizens* in the Constitution is taken to be equivalent only to *free subject*, or *free domiciled inhabitant*, it would give to all "the people of each State," free of condition, the right of becoming domiciled inhabitants of any other State, instead of the mere right of ingress and regress without change of domicile. And if the term in the Constitution is to be taken to express the possession of a condition of civil privilege beyond that implied in "free inhabitants," it limits to those particular persons who may possess that condition even the right of ingress and regress.

But the mere change of the terms used indicates a difference of intention.<sup>1</sup> It may be inferred that "the citizens of each State" spoken of in the Constitution are to be distinguished from "free inhabitants" and from "the people" of such State; that not all the free inhabitants are now to be "entitled to all the privileges and immunities of free citizens in the several States," nor are all domiciled inhabitants now to have free ingress and regress without change of domicile, under the law of national authority; but that this right of ingress and regress, under that law, is now limited to those who may also become domiciled inhabitants of a State, and that now those who are thus privileged are distinguished not merely by the possession of personal freedom, but by the possession of a superior degree of civil privilege denominated citizenship, whatever that may be and by whatever standard or juridical authority its personal extent is to be determined. And whether this extent is determined for the domiciled inhabitants of each

*citizens* in another, and *people* in another; or what is meant by superadding to 'all privileges and immunities of free citizens,' 'all the privileges of trade and commerce,' cannot easily be determined. It seems to be a construction, however, scarcely avoidable, that those who come under the denomination of *free inhabitants* of a State, though not citizens of such State, are entitled, in every other State, to all the privileges of *free citizens* of the latter," &c.

<sup>1</sup> Taney, Ch. J., 19 How. 419; *ante*, p. 298. Judge Curtis argues, 19 How. 584, *ante*, p. 312, note, on the supposition that the intention must have been on each occasion the same.



State by its several standard, or by some criteria common to the constituent parties, is the question herein already considered.

§ 653. Before examining certain acts of national legislation which have been referred to by commentators on this provision as indicating the intention of the parties, it may be necessary to consider the modes in which citizenship, in the sense of a superior condition of civil privilege, may exist under that division of sovereign power which is found in the United States.

If citizenship consists in the possession of those individual and relative rights which in each State depend on the sovereign powers "reserved" in the States severally, there can be no doubt that the negro or Indian inhabitants may, by the juridical will of the State, be citizens within its jurisdiction, for there is nothing in the Constitution of the United States limiting the powers of the States in this respect. It has been said that the citizen of a State is also a citizen of the United States, and undoubtedly this must be, in a certain sense, true. Each inhabitant of a State, being subject to a distributed sovereignty, owes a correspondingly distributed allegiance, and stands in the relation of subject towards the people of the United States and the people of the State at the same time, though in a different sphere of action. Though the rights of citizenship, in the enlarged sense, depend on the will of the State wherein he is domiciled, he is yet, while enjoying those rights, a citizen both in reference to the sovereignty of the State and that held by the government of the United States. But the comparative national or local extent of that citizenship must be determined by the distribution, under public law, of the power to maintain those privileges and immunities wherein it consists. From the sovereign nature of the powers held by the States severally, upon his going into another State the rights and privileges of his citizenship would continue or cease to exist at the will of this latter, if there were limitation of those powers in the Constitution. So that although his subjection in respect to the national powers would continue, his citizenship, in the sense of a privileged condition, would not have a national character;



being everywhere dependent upon the will of the State within whose limits he might be found. If the rights incident to citizenship in the enlarged sense can in any case be maintained in reference to foreign jurisdictions, they would, in the instance of those who hold them under the State law, be maintained by the national authority, and in relations with foreign governments such persons would claim the rights belonging to citizenship in the enlarged sense in the character of persons owing allegiance to the national authority. In this view, the citizen of a State may be said to possess civil privileges as a citizen of the United States; being, of course, always a citizen of the United States in that sense in which citizen and subject are equivalent terms of international law.<sup>1</sup> But since in each State his individual and relative rights would depend upon the State powers, he could not be said to possess the constituent privileges of his citizenship under a national law; though his subjection to the powers held by the national government and his allegiance to the nation continues irrespectively of the will of the people of the several State of which he is an inhabitant. The object of this provision of the fourth Article is to give something of national citizenship under a *quasi*-international law.

These distinctions must be borne in mind when in determining who are citizens under this provision it is said, as by Story, in his Comm. § 1806: "The intention of this clause was to confer on them, if one may so say, a general citizenship;"<sup>2</sup>

<sup>1</sup> It is in this sense only that a citizen of one of the States can claim the character of a citizen of the United States in foreign countries, or that the national government, in a passport, asks foreign governments to recognize any one as such citizen. The refusal of the State Department to give the ordinary passport to negroes (spoken of by Judge Taney, 19 How. 421, as supported by Mr. Cushing; but I have not found any opinion on that point in the published Opinions of Atty. Gen'l), seems utterly without reason under any known theory of international action, or to have been dictated by zeal on the part of those in office to justify the States which insist that negroes are not citizens within the purview of this provision of the fourth Article. Mr. Legare, 4 Op. U. S. Atty. Gen'l 147, without discussing how far a negro "may be a citizen in the highest sense of the word—that is, one who enjoys in the fullest manner all the *jura civitatis* under the Constitution of the U. S.," was of opinion that the purpose of the pre-emption law of 1841 was only to exclude aliens; that free negroes have at least the rights of *denizens*, and are capable of all the rights which mere birth under the allegiance of a country bestows.

<sup>2</sup> But this *general citizenship* is a condition of privilege which is the effect of this provision. Judge Taney would have a general citizenship exist which should

and "every citizen of a State is *ipso facto* a citizen of the United States."

§ 654. The terms of the second and third section of the first Article of the Constitution, declaring that none shall be eligible as a Representative who has not been "seven years a citizen of the United States, and who shall not, when elected, be an inhabitant of that State in which he shall be chosen," nor as Senator unless for nine years "a citizen of the United States," and an inhabitant of the State, and of the first section of the second Article, that "no person except a natural born citizen or a citizen of the United States at the time of the adoption of the Constitution," and fourteen years "a resident within the United States," shall be eligible as President—have been referred to as showing the meaning of the words "the citizens of each State," in this clause. Thus Judge Curtis, in 19 Howard, 571, 572,<sup>1</sup> refers to the last of these with that purpose, arguing from it that citizen in the fourth Article is, likewise, equivalent to free subject, native or naturalized.

"Citizen of the United States," may well be concluded to have this meaning in these clauses of the Constitution, because the domiciled inhabitants of the States are spoken of in their relation to the national powers. But it is not necessary to admit that "citizens of each State" means citizens in this sense only; for, under the powers held by the States, citizenship may be more than the simple condition of free domiciled inhabitant, native or naturalized.

§ 655. As Congress has never legislated in reference to this provision, there is no legislative action which can be referred to as contemporary construction except the State laws already noted. But acts of Congress, under powers given by other parts of the Constitution, especially such as were closely subsequent to its adoption, may perhaps be referred to as an index of the intention in this provision of those from whom it derives its authority, or of its spirit and meaning. Though, as the

limit this provision, and as there is no general condition of privilege except that created by this clause, he is obliged to invent one. See also the note on Judge Curtis's argument. *Ante*, p. 308.

<sup>1</sup> This portion of Judge Curtis's argument was omitted in citing from his opinion. *Ante*, p. 301.



validity of such acts depends upon the Constitution, only such acts can here be referred to as have been always regarded as within the powers of Congress.

It is on this principle only that it would be proper to refer to the naturalization laws of Congress declaring who may become citizens of the United States,<sup>1</sup> or to the act of Congress of 1803, To prevent the importation of slaves into the United States, which provides that "no master of a vessel or other person shall import any negro, mulatto, or other person of color, not a native, a citizen, or registered seaman of the United States;"<sup>2</sup> or to the act declaring that "every free, able-bodied white citizen,"<sup>3</sup> may be enrolled in the militia, or the act of 1813, 2 St. U. S. 809, that it should not "thereafter be lawful to employ, on board of any public or private vessels of the United States, any person or persons except citizens of the United States, or persons of color, natives of the United States."

From this last only it might be inferred that "citizen of the United States," in the public law of the nation, means more than domiciled inhabitant, native or naturalized. But it is too remote in time to be referred to as showing the intention of the

<sup>1</sup> Judge Taney, 19 Howard, 419, refers to act of 1793, which "confines the right of becoming citizens 'to aliens being free white persons.'" These acts enable aliens to become *citizens*. But they rest upon the power to declare a uniform rule of naturalization. Therefore, the alien becomes *citizen* only in acquiring the character he would have had if born in the United States. By discriminating the whites *among aliens* as alone capable of becoming citizens, the act does not declare that, of native born persons, only whites are citizens; even if citizen in the act means more than native or naturalized subject. It seems hard to deny that a negro born in the United States needs no naturalization to make him a negro born in the United States. But Judge Taney, *ib.* 420, thought it necessary to deny that Congress had power to naturalize Indians and negroes "born in this country." See *ante*, p. 294.

<sup>2</sup> See Jay's Inquiry, 41. Curtis, J., 19 How. 587. *Ante*, p. 313, note. This statute is not cited by Judge Taney. The word *native* is in all probability used here to designate a slave born in the United States who is brought back from some foreign country to which he had been carried.

<sup>3</sup> Judge Taney, 19 How. 420:—"The word *white* is evidently used to exclude the African race, and the word "citizen" to exclude unnaturalized foreigners; the latter forming no part of the sovereignty, owing it no allegiance, and therefore under no obligation to defend it. The African race, however, born in the country, did owe allegiance to the government, whether they were slave or free; but it is repudiated and rejected from the duties of citizenship in marked language." Most persons would think that this discrimination of *white citizens* indicated that there might be citizens of some other complexion. See Jay's Inquiry, p. 41, arguing from this and similar discriminations.



Constitution, or even the *usus loquendi* of the time of its adoption.<sup>1</sup> As to the other acts, and all similar enactments, it must be objected that they speak of citizens in a relation towards the powers held by the national government, and therefore use the word only as equivalent to *domiciled inhabitant, native or naturalized*.<sup>2</sup> Therefore, they do not indicate who is *citizen of a State*, unless as they may show that, by the *usus loquendi*, citizen means, wherever used in the Constitution, any such domiciled inhabitant.

§ 656. There does not seem to be anything in the argument of construction by intention which can either change or confirm the interpretation already arrived at.<sup>3</sup> And it is very obvious that any further construction will be in all probability nothing but construction according to present views of legislative policy.<sup>4</sup>

<sup>1</sup> For which purpose it is referred to by Judge Taney, 19 How. 421; *ante*, p. 294; and by Mr. Wirt, 1 Op. U. S. Atty. Gen'l, 506, where, after arguing from the disabilities of free negroes in Virginia that they are not *citizens of the United States*, he also holds that those terms in acts of Congress and the Constitution are not applicable to any free negroes, because, if they were, they should be held to have the privileges and immunities of citizens in other States under the fourth Article, and be eligible even to the Presidency.

<sup>2</sup> Mr. Brightly, in his Digest, p. 842, under the act of 1820, § 4, declaring any citizen of the United States, engaged in the slave trade, punishable as a pirate, notes from *United States v. Darhaud*, as of 3 Wallace, Jr. (not published):—"Citizenship within the meaning of this act is not what may be called citizenship of domicile, nor is it such citizenship as has been claimed by diplomatic assertion, under our naturalization laws, for one who has formally declared his intention to become a citizen without having proceeded further; but it is that citizenship which has a plain, simple, every-day meaning; that unequivocal relation between every American and his country which binds him to allegiance and pledges to him protection." So in *Talbot v. Jansen*, 3 Dallas, 152, one was held to be a citizen of the United States who was not a citizen of any particular State.

Mr. Westlake, an English writer, in a recent work on Private International Law, § 26, says:—"The American use of the term *citizen* is indistinct. A citizenship of a particular State is recognized, as well as one of the Union; and the term is sometimes used to express the enjoyment of full internal political rights, so as to be denied to persons of color, who, even in many of the free States, are not suffered to hold office or vote for public officers. But it is only with the citizenship of the United States that we have in this place to do, and with that in the largest sense; for we are here considering the distribution of men between nations which have a recognized standing by each others' side; and all public relations are reserved to the Union by its Constitution; wherefore a slave or a person of color, whatever his rights at home, is internationally a member of the body called the United States, since that is the government under which he stands in relation to foreigners."

<sup>3</sup> *Ante*, § 650.

<sup>4</sup> What may be styled the argument *ab inconvenienti* is not uncommonly employed in cases wherein the rights of the negro inhabitants are considered. In

§ 657. It would seem that a question might hereafter be raised of the capacity for citizenship, in view of this provision of some, who are neither of the negro nor of the European or white race. Chief Justice Taney said that a person of the aboriginal or Indian race who "should leave his tribe or nation and take up his abode with the white population, would be entitled to all the rights and privileges which would belong to an emigrant from any other foreign people."<sup>1</sup> In the same place he has said that Indians may be naturalized by Congress. Whether this involves the proposition that no person of the Indian race can be a citizen of the United States unless so naturalized, may however be doubted.<sup>2</sup> If any of that race may be such a citizen, or a citizen of a State, without such naturalization, they are probably such as are no longer living among a tribe recognized as a corporate body either by the national government or by the State within whose limits they may be.<sup>3</sup>

The question may also arise in cases of persons born in this country of parents of some Asiatic or Polynesian race.<sup>4</sup>

Hobbs v. Fogg, 6 Watts, 559, 560, the doctrine—that the possession of citizenship which is to be recognized under this provision is determined by the law of the State of domicile only—is indicated, though in a singular manner. It is there held that a domiciled free negro cannot be a freeman or elector in Pennsylvania (*ante*, p. 72, n.), because it would be very inconvenient to expect other States to recognize him as a citizen in view of this provision. But this is not equal to Judge Taney's arguing (19 How. 423, *ante*, p. 296) that negroes cannot be citizens in view of this clause—because, if they were, they would be entitled to its benefits!

<sup>1</sup> 19 Howard, 404. *Ante*, p. 281, note.

<sup>2</sup> The act of Congress, for the relief of the Stockbridge Indians in Wisconsin Territory, V. St. U. S. 647, provides for a division of the tribe lands, after which, by sec. 7, they are declared citizens of the United States and entitled to all the privileges of such. They are not said in the act to be *naturalized*. The question has been raised whether an Indian or person of mixed blood, "retaining tribal relations," can at the same time enjoy the privileges of a "citizen of the United States," under the Land laws. Mr. Cushing, in Op. July 5, 1856, 7 Op. of Atty. Gen., 746, holds the negative; and further (as in Op. of May 23, 1855, *ib.* 175), that a white who may have joined himself to a tribe, ceases to be a citizen of the U. S. The paper is of interest, particularly as the writer recognizes the inevitable negro as remotely interested in the question. Mr. Cushing also affirms the more general proposition—"In fine, no person of the race of the Indians is a citizen of the U. S. by right of local birth. It is an incapacity of his race:" and holds it certain that the "civilized persons of Indian descent not members of any tribe," who, by the Constitution of Wisconsin may vote, are not citizens of the United States. But in what sense, then, were the Stockbridge Indians made citizens?

<sup>3</sup> In respect to a State in which they may live, Indians, whether they are members of a tribe or not, are, as a general rule, in a peculiar condition of tutelage. 2 Kent's Comm. 73, and cases.

<sup>4</sup> So if naturalization, under the present law of Congress, limiting it to "free white persons," were claimed for aliens of those races or of the negro races, or



In view of any limitation of the terms "citizens of each State" by physiological distinctions, it may become necessary, as in cases of persons known to be of mixed race, for the judiciary to determine how persons of the white, or "citizen race," may be discriminated from the negro or other incapacitated races. For reasons already stated, it would appear that the rule could not be taken either by a State or national tribunal from the law of the particular State in which the question might arise.<sup>1</sup> It would appear, too, that as the question is of the extent of a term in the Constitution, it would not be competent for the national legislature to fix upon a criterion to be used by the national judiciary. The national courts would be obliged to discover a *common-law* discrimination. They would probably be justified in deducing it from a comparison of the standards which have been followed by the States, especially by the older ones.<sup>2</sup>

§ 658. It will be necessary, in the next chapter, to consider whether the privileges and immunities guaranteed by this provision to the persons known as "the citizens of each State," must not be limited by the *police powers* of each State. But it is proper here to notice some *dicta*,<sup>3</sup> to the effect that, either

those called in South Carolina and Georgia laws "free Moors, Lascars, or other colored subjects of countries beyond the Cape of Good Hope." *Ante*, pp. 98, 105.

<sup>1</sup> *Ante*, §§ 604-606.

<sup>2</sup> It is with this idea probably that Kent, in 2 Comm. pp. 72, 256, refers to the statutes and decisions of some of the States. Most of the State statutes on this subject have been noted. See *ante*, Va. p. 4; Ky. p. 19; N. Car. p. 86; Tenn. p. 90; Ga. 105; Ohio pp. 121, 122; Ind. pp. 128, 131; Ill. p. 135; Ark. p. 173; Iowa p. 177; Texas p. 197; Cal. p. 204; and decisions N. Car. p. 88, n.; S. Car. 98, n.; Ohio pp. 118, n.; 121, n.; 122, n. The most common rule seems to be, that one fourth or more of negro blood incapacitates, in matters of evidence (on negro incapacity as witness, see Appendix to Appleton's Rules of Ev.); and from the authorities cited by Kent, it may be said that, "if the admixture of African blood does not exceed one eighth, the person is deemed white."

<sup>3</sup> In *The Passenger* cases, 7 Howard 283-573, the question was of the relative extent of the powers of the States and of the national government in respect to the entry, &c., of foreign aliens. But the language of several of the judges will apply as well to domestic aliens. The court was divided, and of the minority, Ch. J. Taney, in his opinion, 7 How. 457, distinguished the question, Whether the federal government has the power "to compel the States to receive, and suffer to remain in association with its citizens, every person or class of persons whom it may be the policy or pleasure of the United States to admit," as lying at the foundation of the controversy. And said, "For if the people of the several States of this Union reserved to themselves the power of expelling from their borders any person or class of persons whom it might deem dangerous to its peace or likely to produce a physical or moral evil among its citizens, then any treaty



the persons who are to be recognized as citizens may be discriminated by each State in the exercise of its police power, or, that, any persons, though admitted to be citizens, may yet be excluded from any benefit from this provision at the discretion of the State, whenever it professes to exercise this power. Though it be apparent that the extent of "the privileges and immunities," in the latter part of the provision may, consistently, be subject to the police power, yet the doctrine above stated seems to render the constitutional provision utterly nugatory.

§ 659. In determining who are "citizens of each State," a question also arises as to the meaning of the word *State* in this clause. This question has not probably as yet been raised in any reported case. The authorities on the meaning of the same word in the third Article, and in the first section of the fourth Article, have been noted.<sup>1</sup> The question will hereinafter be considered in connection with a similar inquiry arising under other clauses of this Article.

or law of Congress invading this right and authorizing the introduction of any person or description of persons against the consent of the State, would be a usurpation of power which this court could neither recognize nor enforce. I had supposed this question was not now open to dispute. It was distinctly decided in *Holmes v. Jennison*, 14 Peters 540; in *Groves v. Slaughter*, 15 Peters 449; and in *Prigg v. The Commonw. of Pennsylvania*, 16 Peters, 539. If these cases are to stand, the right of the State is undoubted. And it is equally clear that, if it may remove from among its citizens any person or description of persons whom it regards as injurious to their welfare, it follows that it may meet them at the threshold and prevent them from entering," &c. And to the same effect on p. 467.

That the negro was not forgotten here, appears from the opinions of some of the other judges. Judge Wayne, *ib.* 426, said:—"But I have said the States have the right to turn off paupers, vagabonds, and fugitives from justice, and the States where slaves are have a constitutional right to exclude all such as are from a common ancestry and country, or of the same class of men." And Judge Grier, *ib.* 457:—"Nor the right of any State, whose domestic security might be endangered by the admission of free negroes, to exclude them from her borders. This right of the State has its foundation in the sacred law of self-defence, which no power granted to Congress can restrain or assail." Mr. Berrian, in 2 Op. U. S. Atty. Gen'l, justified the law of South Carolina as within the police power. See *ante*, p. 97, note, where it should also have been noted that Mr. Wirt, 1 Op. U. S. Atty. Gen'l, 659, had held the law unconstitutional as interfering with the powers of Congress to regulate commerce.

In 20 N. Y., 611, Denio, J. says:—"But it does not seem to me clear that one who is truly a citizen of another State can be thus excluded, though he may be a pauper or a criminal, unless he be a fugitive from justice. The fourth Article of confederation contained an exception to the provision for a common citizenship, excluding from its benefits paupers and vagabonds, as well as fugitives from justice; but this exception was omitted in the corresponding provision of the Constitution." Mr. Justice Curtis (19 How. 584, *ante*, p. 312, note) would seem to argue differently.

<sup>1</sup> *Ante*, p. 267; and Vol. I. p. 433, note.

## CHAPTER XXIV.

DOMESTIC INTERNATIONAL LAW OF THE UNITED STATES. THE SUBJECT CONTINUED. OF THE PRIVILEGES AND IMMUNITIES OF CITIZENS GUARANTEED IN THE FIRST PARAGRAPH OF THE SECOND SECTION OF THE FOURTH ARTICLE OF THE CONSTITUTION.

§ 660. When the personal application of the terms, "the citizens of each State," has been settled, it remains to consider the second inquiry arising under the clause in the fourth Article: What are the rights intended by the phrase, "all privileges and immunities of citizens"?<sup>1</sup>

The terms, *privileges and immunities*, are, obviously, in themselves indeterminate, and hardly more significant than *rights*. There can be no controversy about their individual meaning. Their whole force must be derived from the word *citizen* with which they are coupled; and the question here is, What standard of the rights of citizenship is intended?

As has been shown, a preliminary question arises as to the meaning of *citizen*—that is, whether it means domiciled inhabitant, native or naturalized only, or such inhabitant holding a particular condition of civil privilege.<sup>2</sup> But under this part of the clause, these two questions—of the meaning of *citizen*, and the standard of the rights of citizenship—cannot easily be distinguished, since the nature of the citizenship intended must consist in privileges and immunities of some kind.

The question presents itself, as already stated,<sup>3</sup> whether the intended standard of these privileges and immunities depends

<sup>1</sup> *Ante*, § 634.

<sup>2</sup> *Ante*, § 633.

<sup>3</sup> *Ante*, § 634, question 2; in which section, under question 1, it was also argued that the extent of the terms, "the citizens of each State," cannot be determinable by the law of the State in which those may appear who claim to be such. But the reason there given will not apply here to exclude the law of such State as one of the possible standards of the privileges and immunities of citizenship for this part of the clause.



on the law of the domicile of "the citizens of each State," or on the law of the State forum in which they appear as aliens; or whether some common criterion is here implied, and, if so, how it is to be ascertained.

§ 661. If there is any State legislation in respect to the privileges and immunities which such "citizens" from other States shall enjoy within the legislating State,<sup>1</sup> this may be referred to as juridical exposition of the legal rights guaranteed by this phrase.

§ 662. There are very few judicial decisions which can be cited as directly in point in this inquiry.<sup>2</sup> Those which have been referred to under the former question have but little bearing here.

In *Campbell v. Morris* (1797), 3 Har. & McHenry, 553-556, the law of Maryland authorizing the attachment of the property of non-resident debtors, was held not to be any violation of the rights of citizens of other States under this provision. The opinion of the Court of Appeals on this point is not given. In the court below it was said, "It seems agreed, from the manner of expounding or defining the words 'immunities and privileges' by the counsel on both sides, that particular and limited operation is to be given to these words, and not a full and comprehensive one." The judge proceeds to specify political rights as not included; notices, as being among the rights guaranteed, the right of holding real and personal property in the same manner as the citizens of the forum; and adds a remark of importance in this connection, notwithstanding its brevity,—*"It secures and protects personal rights."*<sup>3</sup>

In *Livingston v. Van Ingen* (1812), 9 Johns. 577, where the State law giving exclusive privileges of navigation in the waters of the State was in question, it was said by Kent, Ch. J.: The provision "means only that the citizens of other States

<sup>1</sup> As, for instance, any laws taxing property of non-residents; requiring security from them, in actions at law, beyond that required of others.

<sup>2</sup> Mr. Cushing, 7 Op. U. S. Atty. Gen. 753,—*"that unexplored clause of the Constitution."*

<sup>3</sup> This case is referred to in *Haney v. Marshall*, 9 Maryl. 194, where it was held that the State statute requiring security for costs from non-resident plaintiffs was not in violation of this provision. The court relied on the long-undisputed existence of such laws.



shall have *equal* rights with our own citizens, and not that they shall have different or greater rights. Their persons and property must, in all respects, be equally subject to our law."

In *Corfield v. Coryell* (1823), 4 Wash. C. C. R. 371, where the validity of the New Jersey law of June 9, 1820, sec. 6, prohibiting non-residents to fish for oysters, was questioned, Washington, J., said: "We feel no hesitation in confining these expressions to those privileges and immunities which are in their nature *fundamental*—which belong of right to the citizens of all free governments, and which have at all times been enjoyed by the citizens of the several States which compose this Union from the time of their becoming free, independent, and sovereign. What these fundamental principles are, it would perhaps be more tedious than difficult to enumerate. They may, however, be all comprehended under the following general heads: Protection by the government; the enjoyment of life and liberty, with the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety, subject nevertheless to such restraints as the government may justly prescribe for the general good of the whole; the right of a citizen of one State to pass through or to reside in any other State for purposes of trade, &c.; to claim the benefit of the writ of habeas corpus; to institute and maintain actions of any kind in the courts of the State; to take, hold, and dispose of property; and an exemption from higher taxes, &c., than are paid by the other citizens of the State." To these was to be added, the elective franchise, as regulated by the law of the State where it should be exercised. But the judge denied that citizens of the several States "are permitted to participate in all the rights which belong exclusively to the citizens of any other particular State merely upon the ground that they are enjoyed by the latter," as, in this instance, the fishery.

In *Abbot v. Bayley* (1827), 6 Pick. 89, the question was whether the plaintiff could sue as feme sole, having a husband living in another State who had abandoned her and had married another; and the opinion was that the case was not affected by anything in the Constitution of the United States.

Parker, Ch. J., p. 91, asked : By this provision, "are the jurisdictions and governments so amalgamated that they are not in any respect to be considered as foreign to each other? In all national matters they are, in many respects, one and the same, being subject to the same laws and the same government; but in all matters of domestic regulation they may be considered as foreign; as, for instance, in all their criminal jurisdiction, and rules affecting property, except so far as either is subject to the laws of the United States. \* \* \* The jurisdictions of the several States, as such, are distinct, and in most respects foreign. The Constitution of the United States makes the people of the United States subjects of one government *quoad* every thing within the national power and jurisdiction, but leaves them subjects of separate and distinct governments. The privileges and immunities secured to the people of each State can be applied only in case of removal from one State into another. By such removal they become citizens of the adopted State without naturalization, and have a right to sue and be sued as citizens; and yet this privilege is qualified and not absolute, for they cannot enjoy the right of suffrage or eligibility to office, without such term of residence as shall be prescribed by the Constitution and laws of the State into which they remove. They shall have the privileges and immunities of citizens: that is, they shall not be deemed aliens, but may take and hold real estate, and may, according to the laws of such State, eventually enjoy the full rights of citizenship without the necessity of being naturalized. The constitutional provision referred to is necessarily limited and qualified; for it cannot be pretended that a citizen of Rhode Island coming into this State to live is *ipso facto* entitled to the full privileges of a citizen, if any term of residence is prescribed as preliminary to the exercise of political or municipal rights."

In *Crandall v. The State* (1834), 10 Conn. 343,<sup>1</sup> Judge Daggett, in charging the jury, said of this provision, "It has been urged that it is made to direct exclusively the action of the general government, and therefore can never be applied to State laws. This is not the opinion of the court. The plain

<sup>1</sup> *Ante*, p. 46.



and obvious meaning of this provision is to secure to the citizens of all the States the same privileges as are secured to our own by our own State laws." The question was not considered by the Supreme Court of Errors, in reversing the judgment of the court below.

In *Conner v. Elliott* (1855), 18 How. 593, Mr. Justice Curtis, delivering the opinion of the court, said that it had been insisted "that, as the laws of Louisiana provide that a contract of marriage made in that State or the residence of persons there in the relation created by marriage shall give rise to certain rights on the part of each in property acquired within that State, by force of the Article of the Constitution above recited, all citizens of the United States wherever married and residing obtain the same rights in property acquired in that State during the marriage. We do not deem it needful to attempt to define the meaning of the word *privileges* in this clause of the Constitution. It is safer, and more in accordance with the duty of a judicial tribunal, to leave its meaning to be determined, in each case, upon a view of the particular rights asserted and denied therein. And especially is this true when we are dealing with so broad a provision, involving matters not only of great delicacy and importance, but which are of such a character that any merely abstract definition could scarcely be correct, and a failure to make it so would certainly produce mischief.

"It is sufficient for this case to say that according to the express words and clear meaning of this clause, no privileges are secured by it except those which belong to citizenship. Rights attached by the law to contracts, by reason of the place where such contracts are made or executed, wholly irrespective of the citizenship of the parties to those contracts, cannot be deemed 'privileges of a citizen,' within the meaning of the Constitution. Of that character are the rights now in question," &c.

It will be remembered that the meaning of this clause of the Constitution was not involved in the decision of the *Dred Scott* case.\* But the authority which has popularly been at-

\* *Id.*, p. 280.



tributed to the Opinions in that case, as expository of this provision requires a notice of the dicta bearing on the present point of inquiry. In a portion of his Opinion already cited, Chief Justice Taney said that the provision guarantees rights to a person included within the description "citizens of each State," only while temporarily within it; that it gives him no political rights therein, but that "whenever he goes into another State the Constitution clothes him, as to the rights of person, with all the privileges and immunities which belong to citizens of the State."

On p. 425 of the report, the Judge says, of the case of *Le-grand v. Darnall*, "This case, however, strikingly illustrates the consequences that would follow the construction of the Constitution which would give the power contended for to a State [i. e., to make a negro either a citizen of a State in view of this provision, or a citizen of the United States]. It would also give it to an individual. For if the father of young Darnall had manumitted him in his lifetime, and sent him to reside in a State which recognized him as a citizen,<sup>1</sup> he might have visited and sojourned in Maryland when he pleased, and as long as he pleased, as a citizen of the United States; and the State officers and tribunals would be compelled, by the paramount authority of the Constitution, to receive him and treat him as one of its citizens, exempt from the laws and police of the State in relation to a person of that description, and allow him to enjoy all the rights and privileges of citizenship, without respect to the laws of Maryland, although such laws were deemed by it absolutely essential to its own safety."

In *Lemmon v. The People* (1860), 20 N. Y. 608, Judge Denio, after speaking of the corresponding provision in the Articles of Confederation, says, "The Constitution organized a still more intimate Union, constituting the States for all external purposes, and for certain enumerated domestic objects, a single nation; but still the principle of State sovereignty was retained as to all subjects except such as were embraced in the delegations of power to the General Government or

<sup>1</sup> *Ante*, p. 295.

<sup>2</sup> But it would have been this State which had exercised the obnoxious power—not the father.

prohibited to the States. The social *status* of the people, and their personal and relative rights as respects each other, the definition and arrangements of property, were among the reserved powers of the States; the provision conferring rights of citizenship upon the citizens of every State in every other State, was inserted substantially as it stood in the Articles of Confederation. The question now to be considered is, how far the State jurisdiction over the subjects just mentioned is restricted by the provision we are considering, or, to come at once to the precise point in controversy, whether it obliges the State governments to recognize in any way, within their own jurisdiction, the property in slaves which the citizens of States in which slavery prevails may lawfully claim within their own States—beyond the case of fugitive slaves. The language is, that they shall have the privileges and immunities of citizens in the several States. In my opinion, the meaning is, that in a given State every citizen of every other State shall have the same privileges and immunities—that is, the same rights—which the citizens of that State possess. In the first place, they are not to be subjected to any of the disabilities of alienage. They can hold property by the same titles by which every other citizen may hold it, and by no other. Again, any discriminating legislation which should place them in a worse situation than a proper citizen of the particular State would be unlawful. But the clause has nothing to do with the distinctions founded on domicile. A citizen of Virginia, having his home in that State, and never having been within the State of New York, has the same rights under our laws which a native-born citizen domiciled elsewhere, would have, and no other rights. Either can be the proprietor of property here, but neither can claim any rights which under our laws belong only to residents of the State. But where the laws of the several States differ, a citizen of one State asserting rights in another, must claim them according to the laws of the last-mentioned State—not according to those which obtain in his own. The position that a citizen carries with him, into every State into which he may go, the legal institutions of the one in which he was born, cannot be supported. A very little reflection will



show the fallacy of the idea. Our laws declare contracts depending upon games of chance or skill, lotteries, wagering policies of insurance, bargains for more than seven per cent. per annum of interest, and many others, void. In other States such contracts, or some of them, may be lawful. But no one would contend that if made within this State by a citizen of another State where they would have been lawful, they would be enforced in our courts. Certain of them, if made in another State and in conformity with the laws there, would be executed by our tribunals, upon the principles of comity; and the case would be the same if they were made in Europe, or in any other foreign country. The clause has nothing to do with the doctrine of international comity. That doctrine, as has been remarked, depends upon the usage of civilized nations and the presumed assent of the legislative authority of the particular State in which the right is claimed; and an express denial of the right by that authority is decisive against the claim." The judge refers to the legislation of New York excluding slavery, and further considers the claim of the slave-owner in that case.<sup>1</sup>

§ 663. It is not probable that any right or obligation has been judicially sustained in any case as a legal effect derived from this provision alone. In many instances, probably, it has been urged in support of claims which have not been judicially sustained. Such cases can only show what effects the provision does not produce. Among these must be classed, according to the existing decisions, the claim of a citizen of a slave-holding State to any right of a slave-owner or master in the jurisdiction of another State. The question in such cases will be particularly examined in the latter part of this chapter.

§ 664. In the passage cited in the last chapter from Story's Comm. § 1806,<sup>2</sup> he seems to assume that the privileges and immunities guaranteed to the "citizens of each State," whoever these may be, "in every other State," are as indeterminate as those of the domiciled inhabitants of such other State. He has said the intention was to confer "a general citizenship,

<sup>1</sup> See the other opinions noticed where this claim is hereinafter considered.

<sup>2</sup> *Ante*, p. 315.



and to communicate all the privileges which the citizens of the same State would be entitled to under like circumstances." If the circumstances which are to affect the enjoyment of these rights are to be judged of solely by the State of jurisdiction in reference to the domestic aliens, as fully as in the case of its own citizens, then the "general citizenship" hereby conferred, is only the right of assuming the simple relation of domiciled inhabitant, whose privileges and immunities vary in each State under local laws. At most, the citizen of another State is entitled only to a degree of privilege and immunity already attributed by the State to some of its permanent inhabitants, and there is no general standard of citizenship, as a condition of privilege beyond that of domiciled subject, having a *quasi*-international effect between the States.

Of like effect is all that Kent has observed on this point:—"If they remove from one State to another, they are entitled to the privileges that persons of the same description are entitled to in the State to which the removal is made, and none other. The privileges thus conferred are local and territorial in their nature. The laws and usages of one State cannot be permitted to prescribe qualifications for citizens to be claimed and exercised in other States in contravention to their local policy."<sup>1</sup>

§ 665. In considering the effect of this clause, that distinction must be remembered which results from the fact that aliens may appear within the forum either as persons proposing to assume the relation of domiciled inhabitants, relinquishing any claim which they might have had by international law or compact to a condition of privilege primarily existing under the law of their former domicile, had they chosen to appear only as temporary residents of the forum; or they may appear in this latter character, and as then retaining the relation, recognized in international law, of subjects or domiciled inhabitants of the place from which they came; and as claiming rights, in the forum, due to them in the character of aliens.<sup>2</sup>

The "citizens" of the States may appear in either of these

<sup>1</sup> *Ante*, p. 317.

<sup>2</sup> *Ante*, p. 332.

positions within another State. In the first of these, the clause seems to give them only the right of inter-immigration, or acts like a State naturalization law for such persons in every State wherein they may select a residence. If Kent and Story, in the passages cited, referred only to "citizens" in this position, the correctness of their remarks seems unquestionable. For it cannot be doubted but that the power of each State is the same in respect to each of its domiciled inhabitants.

The language above cited from 9 Johnson and 4 Washington, C. C., may have very different bearing on "citizens of each State," according as they may appear in one or the other of these positions. In neither opinion does the court notice such a distinction. Chancellor Kent, in 9 Johnson, would make the privileges given by the local law the measure of "the privileges and immunities of citizens" for domestic aliens in either position: under which standard, if there should be distinctions of condition among the domiciled inhabitants, it would be necessary to discriminate citizens from other States in classes corresponding with those distinctions.

The case from 4 Wash. C. C. seems to recognize the existence of some national and *quasi*-international standard of rights which are "fundamental and belong of right to the citizens of free governments," as maintained by this clause against the power of the States over the citizens of other States.

§ 666. Since the provision is admitted to be international in its effects, it would seem that it can apply to "citizens" only while in a position recognized by international law, and that can be only while they are domestic *aliens*. Therefore, it may be affirmed that the clause applies to "the citizens of each State" appearing in another State, only so long as they have not acquired a domicile in such other State.<sup>1</sup>

It may be objected that if the citizens of each State are protected by this clause only as domestic *aliens*, and to the extent only of acquiring a domicile, being thereafter absolutely subject to the local authority, they may be immediately ex-

<sup>1</sup> Judge Taney, 19 How. 422, *ante*, p. 295:—"Neither does it apply to a person who, being the citizen of a State, migrates to another State," &c. Judge Parker, in 6 Pick. *ante*, p. 345, seems to be alone in saying that the clause applies only "in case of removal."



and to communicate all the privileges which the citizens of the same State would be entitled to under like circumstances." If the circumstances which are to affect the enjoyment of these rights are to be judged of solely by the State of jurisdiction in reference to the domestic aliens, as fully as in the case of its own citizens, then the "general citizenship" hereby conferred, is only the right of assuming the simple relation of domiciled inhabitant, whose privileges and immunities vary in each State under local laws. At most, the citizen of another State is entitled only to a degree of privilege and immunity already attributed by the State to some of its permanent inhabitants, and there is no general standard of citizenship, as a condition of privilege beyond that of domiciled subject, having a *quasi*-international effect between the States.

Of like effect is all that Kent has observed on this point:—"If they remove from one State to another, they are entitled to the privileges that persons of the same description are entitled to in the State to which the removal is made, and none other. The privileges thus conferred are local and territorial in their nature. The laws and usages of one State cannot be permitted to prescribe qualifications for citizens to be claimed and exercised in other States in contravention to their local policy."<sup>1</sup>

§ 665. In considering the effect of this clause, that distinction must be remembered which results from the fact that aliens may appear within the forum either as persons proposing to assume the relation of domiciled inhabitants, relinquishing any claim which they might have had by international law or compact to a condition of privilege primarily existing under the law of their former domicile, had they chosen to appear only as temporary residents of the forum; or they may appear in this latter character, and as then retaining the relation, recognized in international law, of subjects or domiciled inhabitants of the place from which they came; and as claiming rights, in the forum, due to them in the character of aliens.<sup>2</sup>

The "citizens" of the States may appear in either of these

<sup>1</sup> *Ante*, p. 317.

<sup>2</sup> *Ante*, p. 332.



tion of laws, there is a presumption in favor of the continuance of that law of personal privilege in its effect on private persons, if not in its authority.

Private international law is founded not only on a recognition of alienage but on the recognition of a previous subjection different from that of native or, more generally, of domiciled subjects. It is characterized by allowance, or disallowance, of rights and duties in relations existing under some law other than that of the forum of jurisdiction (*i. e.*, other than its internal or local law), by allowing that other law to attach to aliens personally, and, generally, by applying laws as personal laws.<sup>1</sup> It would seem therefore, that, from the *character* of the provision, there must be some standard of "the privileges and immunities of citizens" distinct from the law of the forum in which they appear as domestic aliens. For the same reason there is a presumption that this standard must be one common to the parties.

The inquiry here is indeed distinct from the question, Who, as citizens, are entitled to the benefit of this provision? But, if these are persons privileged according to some national standard,<sup>2</sup> there seems to be a reasonable parallelism in holding that the measure of "the privileges and immunities of citizens" is also a national one.

It is in accordance with the argument already followed to say—that the effect of this clause is to continue the pre-existing common law of the colonies so far as it contained a standard of the rights of citizens of one locality appearing as domestic aliens within another jurisdiction; although, by the revolution and the establishment of new forms of government, the privileges and immunities of citizenship in the case of domiciled inhabitants became altogether determinable by local law.<sup>3</sup>

<sup>1</sup> *Ante*, Vol. I, p. 48.

<sup>2</sup> *Ante*, § 650.

<sup>3</sup> *Ante*, §§ 433–436. In 20 N. Y. 607, Denio, J., says: "No provision of that instrument has so strongly tended to constitute the citizens of the United States *one* people as this. Its influence in that direction cannot be fully estimated without a consideration of what would have been the condition of the people if it or some similar provision had not been inserted. Prior to the adoption of the Articles of Confederation, the British colonies on this continent had no political connection, except that they were severally dependencies on the British crown. Their relation to each other was the same which they respectively bore to the other English colonies, whether in Europe or Asia. When, in consequence of the Revolution, they severally be-

§ 668. This interpretation being admitted, it is evident that other rights and privileges, not included in this standard, might properly be denied in a State to the citizen of another State, even though they should be actually enjoyed by the residents within the forum of jurisdiction, and be similar to those held by such citizen of another State in his place of domicile. And this conclusion seems reconcilable with the language of Kent, Story, and most of the judicial decisions.

§ 669. The question occurs—Are there then privileges and immunities which, even if denied by a State in the exercise of its several power to all its domiciled inhabitants, can be claimed under this provision of the Constitution in favor of domestic aliens being *citizens* of some other State? If a State should enact laws which, as its municipal, local, or internal law, should abrogate rights which, though not specially guaranteed by the national Constitution in favor of the domiciled inhabitants of the States as against the powers held by the States severally, were yet such as had always been deemed essential to civil liberty,—if, for example, trial by jury were denied in cases directly involving loss of personal security or personal liberty; or if the rights which exist in the relation of family, should be denied to any of the white or “citizen” race; or if acts previously deemed, in the jurisprudence of England and America, essential to civil liberty and among the natural prerogatives of freemen were declared criminal,—would the operation of such State law on citizens of other States, be limited by the guarantee given in this clause?

If the guarantee in the fourth section of this fourth Article

came independent and sovereign States, *the citizens of each State would have been under all the disabilities of alienage in each other, but for a provision in the compact into which they entered, whereby that consequence was avoided.* This is an entirely unsupported assertion and a most deluding misstatement. They would not have been aliens to each other, *because they had not been aliens before*, and on the principle of the continuation of law alone, the inhabitants of one colony would have had in the others all the rights which they could have enjoyed before, when they had all been included in the British empire. If a State *might* have legislated its citizens and those of the other States into a reciprocal alienage—it could have been only by taking the attitude of revolution or *secession*. The judge's statement, however, accords with the common notion—which lies at the foundation of the doctrine of separate State sovereignty, in the secessionists' sense—that the colonies acquired independence singly—a doctrine utterly at variance with history. See *ante*, Vol. I. p. 408, note.



of a republican form of government to every State in the Union<sup>1</sup> affects this question, it must do so by having equal effect as to the rights of all the inhabitants of the State, whether domiciled or alien, and any rights which may be secured by that guarantee rest on the national, municipal, or internal law of the Constitution, rather than on the *quasi*-international law.

If the individual and relative rights<sup>2</sup> formerly attributed by "common law" to the white or European domiciled inhabitant are thus internationally supported by the Constitution of the United States in the case of "the citizens of each State" appearing as domestic aliens in other States, the common law may truly be said to form a part of the national law; and if these rights are in any way maintainable in the courts of the national judiciary, these courts may be said to have to this extent a common-law jurisdiction<sup>3</sup> in cases wherein these rights are in controversy.

§ 670. It is a principle of "the natural or necessary law of nations" that, unless limited by international agreements, every state or nation has the right, based on the right and duty of self-preservation, to exclude from its limits such aliens as it may think proper; or, after their admission, place them under restrictions exceptional to the general freedom of action accorded to other aliens, when their presence is deemed dangerous to the security of the state. This right is exercised through

<sup>1</sup> *Ante*, § 424. Sec. 4, of Art. IV. "The United States shall guaranty to every State in this Union a republican form of government, and shall protect each of them against invasion; and on application of the legislature, or of the executive, when the legislature cannot be convened, against domestic violence." This clause is the only one in the Constitution which contemplates anything like a diplomatic recognition, on the part of the National Government, of the State Governments. It seems to contain a repudiation of the right of secession claimed as a consequence of States-rights doctrine. An usurping minority declaring the secession of the State, might deprive the State—the people of the State—of their right, under this guarantee, to the protection of the nation. It bears also against the doctrine that in each State the sovereignty of the State is held by the State government, and not by the people of the State. (See Vol. I. p. 421, n.) Besides, is a republican government nothing but the absolutism of a numerical majority? If an essential feature of republican government is, that the minority have rights, does not this provision place under the protection of the national government the right of a minority to continue citizens of the United States?

<sup>2</sup> The rights called "personal rights" in the case of *Campbell v. Morris*, *ante*, p. 345, and some authorities which follow it.

<sup>3</sup> *Ante*, §§ 428, 429. Whether any rights may be thus maintained by the national judiciary will depend on the construction of this provision. *Ante*, §§ 601, 602.



that sometimes called the *police* power. Laws which in view of vagrancy and pauperism restrict the entry of persons from other jurisdictions, may be considered an exercise of this power; though it must be assumed that it is always exerted in view of some injury to the state, real or fancied, proceeding from the stranger in his private or individual character, and not on account of his nationality or character as the subject of some particular foreign state. For if so exerted it would acquire the character of public or national action, to be judged of according to public international law.

As this power is vested in the national government only, if at all, in reference to foreign aliens, and is not specifically prohibited to the several States, it is among the so-called "reserved" powers of the States, and may be exercised in reference to all persons coming from other States, unless they are exempted from such power by some provision of the Constitution.<sup>1</sup>

However indescribable may be the extent of "the privileges and immunities of citizens" guaranteed by this provision, it would seem that it should limit the power above spoken of, in the hands of the several States, in respect to all persons included under the terms, "the citizens of each State;" so that no State can ever exercise this power against white domestic aliens, as such aliens, however dangerous their presence may be deemed by the local authority to the interests of the State. This power cannot be exercised against them *as aliens* to exclude them from the limits of the State or prevent their enjoyment of the rights and privileges of citizens; at least when no act contrary to the local (internal) law of the State—the law applying generally to all persons within its limits—has been committed by them under its jurisdiction; the intent of the provision being at least this—that those who are "citizens of a State" shall in every other State be liable only to the same restraint as the domiciled citizens thereof, and be subject, in the

<sup>1</sup> In *Crandall's case*, before referred to, Judge Daggett (10 Conn. 347) argued that the State law might be justified as an exercise of the power to *regulate schools*, and that the same power would apply to white persons from other States. On the power of the States over paupers, vagabonds, and fugitives from justice, as affected by this provision, see the opinions noted, *ante*, p. 341.

exercise of individual or "personal" rights, only to laws which apply equally to all persons resident or present within those limits.<sup>1</sup>

Or, supposing that "the citizens of each State" are not altogether excepted from the exercise of this police power when they appear in other States as domestic aliens, yet, according to the argument hereinbefore set forth, the nature of that power, or the extent to which it may be allowed to interfere with the civil or social action of such citizens, must be determined by some common standard. This can only be found in the history of the previous international and *quasi*-international law of the same country—that is, in that which had force as a national law or the internal law of the nation, identified in a great degree with the common law of England as the standard of "personal rights," and in that which in each colony was determined by its several will.

Whether the extent of this power, in this instance, will be determinable in the courts of each State, and, in the last resort, by the national judiciary, is a question which depends on the *construction* of this provision.

§ 671. The extent of the terms, "privileges and immunities of citizens," is manifestly of great importance in determining the territorial extent and recognition of those individual and relative rights which constitute civil freedom as the condition of a private person within the United States. But since it is impracticable to gather from the existing authorities or from the principles of interpretation herein followed any more limited description than has been already attempted, the inquiry will not be prosecuted further, except as connected with the international recognition of slavery or of rights of ownership in respect to slaves, in the several States.

There are probably many judicial *dicta* which might be referred to as bearing on one or the other side of this question; while there is probably no reported case in which

<sup>1</sup> Therefore, the citizens of other States have, as individuals, a right to be present in every other State, and are not there as invaders, however unwelcome their presence may be, even when they come as an organized army to maintain the laws of the United States against the usurpation of the State government or even of the people of the State usurping the powers of the people of the United States in the name of "secession."



the question has been presented singly for adjudication. According to the synthetical arrangement of the international questions arising in respect to the recognition of slavery which is herein followed, the cases in which these dicta have been given will appropriately be arranged under other issues. It will be seen by the analysis of any supposed case, that the owner's claim, he being a citizen of some State, to slave property in some other State in which he appears as domestic alien, may be urged on one or more of three distinct grounds:

1. As being supported by this provision.
2. As being a special case supported by another provision in this Article.
3. As being supported by private international law, as ordinarily received and without reference to the Constitution of the United States.

In most of the reported cases in which a claim of this kind has been made, it has been founded on the second of these grounds, in the case of a fugitive from service. But in the greater number of cases wherein such a claim made in a non-slaveholding State has been maintained, it is at the same time judicially affirmed or implied that the claim could not be maintained on any other ground.<sup>1</sup>

The judicial dicta affirming the claim on this ground are, it is believed, almost exclusively to be found in the opinions of the courts of the slaveholding States, in declarations of what the courts of the non-slaveholding States ought to decide on this question.<sup>2</sup>

§ 672. There are a few cases in which the claim may have

<sup>1</sup> These cases will be given in Chapter XXV., under the question, Who are fugitives from labor? The cases where the claim to exercise ownership has been denied on the ground that the slave was not *fugitive* are to be particularly noticed in this connection; as *Respublica v. Richards*, 2 Dallas, 225; *Butler v. Hop-*  
*per*, 1 Wash. C. C. 499; *Commonwealth v. Holloway*, 2 S. & R. 305.

<sup>2</sup> In many cases in the slaveholding States, where the question has been of status after return to the former slave domicile, it has been held that the slave has not acquired freedom by being temporarily within a free State. See cases noted in *Cobb's Law of Slavery*, pp. 216, 217. In most of these the unwritten international law alone is relied on as thus supporting slavery in the free State. In *Lewis v. Fullerton* (1821), 1 Rand. 22, and *Julia v. McKinney* (1833), 3 Missouri, 272, judicial dicta attribute the same consequence to this provision. The doctrine was alluded to in argument in *Dred Scott's* case, but not regarded by the court. See *Nelson, J.*, 19 How. 468.



been based on the first and third of the grounds above enumerated.

In the case of Sewall's slaves (1829), 3 Am. Jurist, 404, it was held that the owner of slaves emigrating from Virginia to Missouri was to be recognized as owner while passing through Indiana. But the judge attributed this consequence to the unwritten international law; and says expressly: "But this right, I conceive, cannot be derived from any provision of positive law."

In *Willard v. The People* (1843), 4 Scammon, 461, the right of a slave-owner from Kentucky passing through Illinois, was maintained on the doctrine of international comity. But in the opinion of the court, *ib.* 471, it is also said that, were such owners to be regarded as foreigners, "we could not deny them this international right without a violation of our duty. Much less could we disregard their constitutional right as citizens of one of the States to all the rights, immunities, and privileges of citizens of the several States." Lockwood, J., in a separate opinion, relied entirely on the doctrine of international comity, to be applied at the discretion of the courts.<sup>1</sup>

In *Commonwealth v. Aves* (1836), 18 Pick. 193, also known as *Med's case*, the owner, a citizen of Louisiana, had brought the slave to Boston, intending to remain there a few months. The claim of the owner was disallowed. Shaw, Ch. J., delivering the opinion of the court, said: "The Constitution and laws of the United States, then, are confined to cases of slaves escaping from other States and coming within the limits of this State, without the consent and against the will of their masters, and cannot by any sound construction extend to a case where the slave does not escape," &c.

The case *Jackson v. Bullock* (1837), 12 Conn. p. 38, arose out of similar circumstances, and was decided in the same manner. Williams, Ch. J., held and said it had been conceded that the owner, a citizen of Georgia, could claim "nothing by

<sup>1</sup> This judge states the doctrine very broadly (4 Scam. 474), saying that from the authorities he cites, "the conclusion follows that the courts of this State have the power, independent of legislature enactment, under the law of comity and the exercise of a sound discretion, of determining what laws of other States shall be exercised and enforced in this."

the law of comity, and nothing under the Constitution of the United States." *Ib.* 53.

Bissell, J., dissented, with Church, J., from the majority, but said, *ib.* 55, "I do not found my opinion in this case upon the fact that the respondent is a citizen of a sister State rather than a foreigner; nor upon any principle of comity growing out of the Constitution of the United States, although one object of the Constitution, undoubtedly, was to abolish alienage and to promote a free and unembarrassed intercourse between the citizens of the different States in the Union."

§ 673. In the case of Lemmon's slaves, in New York, the slaves had been brought from Virginia and kept in New York with the design of carrying them to Texas. Judge Paine, before whom the writ of habeas corpus was returned, decided, Nov. 13, 1852, against the claim of the owner, and in his opinion spoke of the reliance in the case on this clause of the Constitution and the reference to the cases in Indiana and Illinois above cited, and said (6 Sandford's N. Y. Superior Court Reports, 713), "I think this remark must have found its way into the opinion of the judge who decided the Illinois case, without due consideration. I have always understood that provision of the Constitution to mean (at least so far as this case is concerned), that a citizen who was absent from his own State, and in some other State, was entitled, while there, to all the privileges of citizens of that State, and I have never heard of any other or different meaning being given to it. It would be absurd to say that while in the sister State he is entitled to all the privileges secured to citizens by the laws of all the several States, or even of his own State; for that would be to confound all territorial limits, and give to the States not only an entire community, but a perfect confusion of laws. If I am right in this view of the matter, the clause of the Constitution relied upon cannot help the respondent; for if he is entitled, while there, to those privileges only which the citizens of this State possess, he cannot hold his slaves."

In the brief opinion of the Supreme Court on hearing the appeal in this case, delivered by Judge Mitchell, it is said (26 Barbour, 287), "Comity does not require any State to extend



any greater privileges to the citizen of another State than it grants to its own. As this State does not allow its own citizens to bring a slave here even *in transitu*, and hold him as a slave for any portion of time, it cannot be expected to allow the citizens of another State to do so. Subdivision 1, of section 2, of Article 4 of the Constitution of the United States, makes this measure of comity a right, but with the limitation above stated, it gives to the citizen of a sister State only the same privileges and immunities in our State which our laws give to our own citizens. It declares that the citizens of each State shall be entitled to all the privileges and immunities of citizens in the several States."

The decision of the Supreme Court was confirmed, March term, 1860, by a majority of the Court of Appeals, consisting of Judges Denio, Wright, Davies, Bacon, and Welles. The dissenting judges were Judges Clerke, Comstock, and Selden.

The portion of Judge Denio's Opinion having most direct bearing on the question here considered has already been cited.<sup>1</sup> On p. 609 of the report, the Judge further expressed his views by supposing the consequences which would follow from the recognition of the right claimed in this instance. On p. 610 he says: "My opinion is, that the appellant has no more right to the protection of this property than one of the citizens of this State would have upon bringing them here under the same circumstances, and the clause of the Constitution referred to has no application to the case."

In a concurring Opinion, Judge Wright noticed, *ib.*, 626, that this provision was "invoked as having some bearing on the question of the plaintiff's right," and said—"I think this is the first occasion in the juridical history of the country that an attempt has been made to torture this provision into a guaranty of the right of a slave-owner to bring his slaves into and hold them for any purpose in a non-slaveholding State. The provision was always understood as having but one design and meaning, viz.: to secure to the citizens of every State, within every other, the privileges and immunities, whatever they might be, accorded in each to its own citizens. It was

<sup>1</sup> *Ante*, p. 347.



intended to guard against a State discriminating in favor of its own citizens. A citizen of Virginia coming into New York was to be entitled to all the privileges and immunities accorded to the citizens of New York. He was not to be received or treated as an alien or enemy in the particular sovereignty." The judge then referred to the article of Confederation, and the substitution of *citizens* in this provision for *free inhabitants*, as indicating an intentional non-recognition of slavery. He argues that if the owner's claim is thus supported, "then Judge Story and the Federal court fell into a great error in the opinion that if it were not for the fugitive-slave provision, New York would have been at liberty to have declared free all slaves coming within her limits," and that Judge Taney also<sup>1</sup> must have erred in "declaring that there was nothing in the Constitution to control the action of a State in relation to slavery within her limits;" adding, "But it seems a work of supererogation to pursue this inquiry."

In affirming the judgment of the Supreme Court, Davies, Bacon, and Welles, JJ., concurred, but delivered no opinions. Judges Clerke, Comstock, and Selden dissented. An opinion was delivered only by Judge Clerke, who maintained the appellant's right in respect to the slaves, as given by private international law; holding them to be property which, under the right of international transit, was protected as against the law of the forum. The question in this view belongs to another chapter. But the judge seems also to have regarded this right as upheld by the Constitution of the United States, and to refer to this clause particularly as having that effect.

Judge Clerke, *ib.* 634, states first the question of the intention of the legislature, concluding, "It evidently intended to declare that all slaves voluntarily brought into this State under any circumstances whatever, should become instantly free." He then says, "But it is a question of much greater difficulty, whether they had the constitutional power to do so."

The judge proceeds to say,—“New York is a member of a confederacy of free and sovereign States, united for certain specific and limited purposes under a solemn and written cov-

<sup>1</sup> The allusion is probably to opinions in *Prigg's case*.

enant. And this covenant not only establishes a confederacy of States, but also, in regard to its most material functions, it gives it the character of a homogeneous national government. The Constitution is not alone federal, or alone national; but by the almost divine wisdom which presided over its formation, while its framers desired to preserve the independence and sovereignty of each State within the sphere of ordinary domestic legislation, yet they evidently designed to incorporate this people into one nation, not only in its character as a member of the great family of nations, but also in the internal, moral, social, and political effect of the union upon the people themselves. It was essential to this grand design that there should be as free and as uninterrupted an intercommunication between the inhabitants and citizens of the different States as between the inhabitants and citizens of the same State." The judge then enumerates the leading grants of power to Congress, "in order to form a more perfect union," together with the mutual covenants or guarantees contained in the fourth Article; observing that it must have been intended thereby to make the union more perfect than under the corresponding Article of Confederation, which he recites.

"Is it consistent," Judge Clerke asks, "with this purpose of perfect union and unrestrained intercourse, that property which the citizen of one State brings into another, for the purpose of passing through it to a State where he intends to take up his residence, shall be confiscated in the State through which he is passing, or shall be declared to be no property, and liberated from his control? \* \* \* By the law of nations, the citizens of one government have a right of passage through the territory of another, peaceably, for business or pleasure; and the latter acquires no right over such person or his property. This privilege is yielded between foreign nations toward each other, without any express compact. It is a principle of the unwritten law of nations.

"Of course this principle is much more imperative on the several States than between foreign nations in their relation toward each other. For it can be clearly deduced, as we have seen, from the compact on which their union is based. There-



fore, making this principle of the law of nations applicable to the compact which exists between the several States, we say that the citizens of one State have a right of passage through the territory of another, peaceably, for business or pleasure, and the latter acquires no right over such person or his property. But the judge who decided this case in the first instance (by whose reasoning, I may be permitted here to say I was erroneously influenced in voting at the general term of the Supreme Court), while admitting the principle of the law of nations which I have quoted, says that the property which the writers on the law of nations speak of is merchandise or inanimate things, and that the principle, therefore, is not applicable to the slaves, who, by the law of nature and of nations, he contends, cannot be property. Foreign nations, undoubtedly, between whom no express compact exists, are at liberty to make this exception. But can any of the States of this confederacy, under the compact which unites them, do the same? Can they make this distinction? In other words, can any one State insist, under the federal compact, in reference to the rights of the citizens of any other State, that there is no such thing as the right of such citizens in their own States, to the service and labor of any person? This is property; and whether the person is held to service and labor for a limited period or for life, it matters not; it is still property—recognized as an existing institution by the people who framed the present Constitution, and binding upon their posterity forever, unless that Constitution should be modified or dissolved by common consent.

“The learned judge who rendered the decision in the first instance in this case would, of course, admit on his own reasoning, that if by the law of nations the right was recognized to property in slaves the principle would apply to that species of property as well as to any other, and its inviolability would be upheld whenever its owner was passing with it through any territory of the family of nations. Can it be disputed that the obligations of the States of this Union towards each other are [not?] less imperative than those of the family of nations would be towards each other, if a right to this species of property was



recognized by the implied compact by which their conduct is regulated? The position, therefore, of the learned judge and of the general term, can only be maintained on the supposition that the compact which binds the States together does not recognize the right to the labor and service of slaves as property, and that each State is at liberty to act towards other States, in the matter, according to its own particular opinions in relation to the justice or expediency of holding such property. It may be therefore necessary more particularly, though briefly, to inquire what were and what had been the circumstances of the original States in relation to this subject, at the time of the adoption of the present Constitution; what was the common understanding in relation to it as pointed out by the debates in the convention, and what does the Constitution itself, by express provisions or necessary implication, indicate on this ever important subject."

In this view Judge Clerke mentions some historical facts, and cites Judge Taney's language, 19 How. 425 (*ante*, 296, 297), that the Constitution recognizes slaves as property, and then referring to the international law or doctrine of comity, observes, *ib. pp.* 642:—"The relations of the different States of this Union towards each other are of a much closer and more positive nature than those between foreign nations towards each other. For many purposes they are one nation; war between them is legally impossible; and this comity, impliedly recognized by the law of nations, ripens, in the compact cementing these States, into an express conventional obligation, which is not to be enforced by an appeal to arms, but to be recognized and enforced by the judicial tribunals." On p. 642, Judge Clerke recapitulates his positions.<sup>1</sup>

The brief remarks of Judges Comstock and Selden, in dissenting, seem to lean to the same view of an international law or rule of comity which receives from the general compact such a force and operation that the judiciary may overrule the action of the legislature. But they make no special

<sup>1</sup> According to Judge Clerke's positions, the claim in these cases may be urged on a fourth ground, besides those already distinguished (*ante*, p. 358), viz:—As being supported by private international law, indefinitely extended under judicial views of the mutual obligations of the States, and having the force of national positive law by being contained in the Constitution.

mention of this particular provision, and they do not speak of Judge Clerke's reasoning.

§ 674. In *Anderson v. Poindexter* (1856), 6 Ohio, 623, the question was of the recognition of notes given for the freedom of the defendant, who had been held by the plaintiff as a slave in Kentucky; the defendant having, before the giving of the notes, been in Ohio for temporary purposes, from which place he had voluntarily returned to Kentucky. The court agreed in holding the notes void. The several judges discussed at great length the effect of a temporary visit to Ohio with the owner's consent, on the status of the defendant after his voluntary return. In the plaintiff's points no mention is made of this provision of the fourth Article; nor is it spoken of in the opinions of Justices Bowen, Brinckerhoff, and Swan, who held the notes given without consideration, on the ground that the defendant was a free person at the time. Bartley, Ch. J., regarded the defendant as a slave, and therefore incapable of making a contract. From the portion of his opinion given in the note,<sup>1</sup> it will be seen that this Judge

<sup>1</sup> After maintaining that, on the doctrine of international comity, the court should recognize the defendant while in Ohio on his master's errand as being still a slave, Judge Bartley (6 Ohio, 686) makes the following observations (italicized as in the report): "This rule of law, founded upon comity prevailing among the distinct and independent nations of the earth, rests upon still higher obligations among the people of the several States of the American Union. Having entered into a league of friendship and solemn compact with each other, as the basis of a confederated government, designed to provide for the common defense and general welfare of the several States, to secure to each its liberty and to establish justice and insure domestic tranquillity, they established intimate relations, and laid the foundation for unrestricted and free commercial and social intercourse between the people of the several States; and that, too, when the relation of master and slave actually existed, to some extent, in every State of the confederacy. Having guaranteed to the people of each State *inviolability in their rights of private property* (?) and *security in their domestic tranquillity*; having declared that the powers enumerated in the Constitution should not be construed to deny or disparage the rights retained by the people; and having guaranteed the sovereignty and independence of each State, subject only to the powers delegated to the confederacy, they recognized the relation of master and servant, secured the return of fugitives from servitude, and provided expressly, that '*Full faith and credit shall be given in each State, to the public acts, records, and judicial proceedings of every other State*,' and that '*The citizens of each State shall be entitled to all the privileges and immunities of citizens in the several States*.'

"United upon such intimate relations, for such purposes, and upon such terms, under the same confederated government, the people of each State are bound, if not by the express obligations, certainly by the spirit and true intent of the compact, to regard with the strictest fidelity, and in the most amicable spirit of reciprocity, all the peculiar rights of the people of each other State which separate



held doctrines similar to those of Judge Clerke in the Lemmon case, and also would give to the first section of this Article that operation for which Mr. Cobb, as noted in a previous chapter, has contended.<sup>1</sup>

§ 675. It is evident that if the law of the State in which the slaveholding citizen from another State may appear is the standard of the rights incident to citizenship, there can be no support given to his claim of ownership by this provision.

It has been seen that this standard is that which is best supported by the authorities bearing on the general question,<sup>2</sup> and that this particular claim has hitherto been uniformly denied in the free States on this ground.

It has been seen that there are no authorities which broadly state that the rights incident to "the citizens of each State" in the State of domicile are to be the standard of the privileges and immunities guaranteed by this provision, and from the opinions of those who would recognize the master's claim in the circumstances indicated, as supported by it, it may be gathered that they regard his right as included among the privileges and immunities of citizenship, as known by some standard common to the parties who established the Constitution.

§ 676. In the argument heretofore presented, on the question of the measure of these guaranteed rights, it was concluded that the effect of this clause was to continue the pre-

and independent nations in their intercourse with each other recognize in regard to the ordinary rights of persons and property, upon the ground of comity. Without this, the harmony required to insure '*domestic tranquillity*' and the free commercial and social intercourse between the people of the several States, essential to the great purposes of the confederacy, cannot be secured. The citizens of each State cannot expect long to enjoy '*all the privileges and immunities of citizens in the several States*,' unless each State maintains a scrupulous regard for comity and reciprocity in this respect. A citizen of Ohio, passing through Kentucky, or going into that State on business, either with his property, or with persons under his guardianship, would expect to be protected in his rights of person and property, held by the laws of his place of domicile, under '*the full faith and credit*' required to be given to the public acts of his State. But if a citizen of Kentucky cannot pass through Ohio, accompanied by his servant, or send his servant into this State on a mere errand, without being divested of his rights secured to him by the public acts of the State of his domicile, there is an end to that comity and reciprocity between the two States required by their relations toward each other as members of the federal compact, which is essential to harmony and unrestricted intercourse between the people of the two States. And such a course on the part of Ohio will subject her citizens to retaliating measures on the part of Kentucky."

<sup>1</sup> *Ante*, p. 262, note 2.

<sup>2</sup> *Ante*, p. 352.



existing *quasi*-international law of the colonies so far as it contained a common standard of the rights of a citizen of one locality when appearing as a domestic alien within another.

It has been shown in the former part of the work that so far as the common law of England, operating as a personal law with national extent in the colonies or the States, was the standard of these rights, it did not maintain the claim of a slave-owner.<sup>1</sup>

§ 677. It may be urged that some rights, though not recognized by the common law of England having this extent in the colonies and States, may have been recognized by that law which had international operation in the colonies and States, and took effect also as personal law.

But the question here is rather of rights supported by law resting on imperial and national authority, and it has been seen that the right of slave-ownership was thus supported only, if ever, so long as property in slaves rested on universal jurisprudence, and that afterwards it was dependent for its recognition upon private international law, as received and allowed in each colony or several State in the independent exercise of its local sovereignty.<sup>2</sup> Therefore, admitting the private international law prevailing in the colonies or States before the adoption of the Constitution to be the standard of these privileges and immunities, and that rights recognized by international law receive additional force and guaranty from this provision, it does not give the right in a non-slaveholding State; for there, according to the principles of international private law as understood at the time of the adoption of the Constitution, the right is not to be recognized.

§ 678. So, too, even if it were to be admitted that private international law, or the doctrine of a comity to be administered by judicial tribunals, did or does allow or require such tribunals to accord to the alien slaveholder the right of passage or transit either at his pleasure, or at his convenience, or at his necessity, with his slave or bond-servant, it is also plain that

<sup>1</sup> *Ante*, § 284, a; § 293, 4th proposition.

<sup>2</sup> *Ante*, ch. IX., and particularly § 312.

this action of the court is founded only on the presumed intention of the lawgiver of the forum of jurisdiction—the several State, in this instance. Therefore, even if a State court may or should, in applying this doctrine of comity in the absence of any more direct evidence of the State's will, recognize the slaveholder's claim in these circumstances, yet the power of the State itself, to declare what it will or will not do out of comity, is not restricted. The judiciary is to enforce the will of the State in this matter of international comity, and not its own idea of what comity may dictate. In expressing the will of the State in this matter, the legislature is superior to the judiciary, as in all matters within the “reserved powers” of the States, if there is no restriction in the State constitution.<sup>1</sup>

Besides, this doctrine of courts determining the rights of private persons by their conception of what international comity may require of the nation, country, or State whose law they administer, is simply a delusive error, as in the second chapter of this work it has been attempted to show. The real basis of the slave-owner's claim, wherever it can be recognized, must be the judicial presumption in favor of the continuance of relations created by the law of another jurisdiction; when not inconsistent with some right or obligation universally attributed in the forum of jurisdiction.<sup>2</sup>

§ 679. If the argument is—that the intention of the provision is to secure against State legislation all rights which, at the time of the formation of the Constitution, were allowed by private international law as then received; that the right of a non-resident slaveholder to pass and repass with slaves, was a right so allowed—it appears that the major proposition of the

<sup>1</sup> See *ante*, §§ 78, 122. Denio, J., 20 N. Y. 609.

<sup>2</sup> *Ante*, §§ 88, 116.

<sup>3</sup> The proposition appears in Judge Clerke's opinion, *ante*, p. 364, though it is there merged in the much broader doctrine, that the effect of the Constitution is to create a general *inter-State* comity, the application of which devolves upon the judiciary as charged with the execution of the Constitution as the supreme law of the land; that this comity is equally a restriction on the legislative power as are the grants of power to a national government or the enumerated restrictions on the States. This indefinitely vast branch of national law is derived by Judge Clerke, it is to be noticed, not merely by interpretation and construction of the several clauses of the Fourth Article, but simply from the *idea* of the Constitution. The doctrine may have been, for the first time, broadly stated in a judicial opinion in the Ohio case, by Judge Bartley, though it is not altogether new.



argument is entirely unsupported by any reasoning, and that the minor is contradictory to the history of international jurisprudence on this question, and originated in the extra-judicial dicta of judges of slaveholding States, and the arguments of executive officers and law-book-writers of those States.

§ 680. It has been shown, in the ninth chapter of this work, that the international law or "comity" had ceased, at the time of *Somerset's case*, to support the owner's claim in any case.<sup>1</sup> In the same chapter, it was shown that the ownership, in respect to slaves, could be supported under the international rule of transit only, if ever, while slaves were property or chattels by the *jus gentium* or universal jurisprudence; that long before the formation of the Constitution slavery of negroes born in the colonies and States had ceased to rest on universal jurisprudence, and was then ascribable solely to the particular law, *jus proprium*, of some one colony or State; while it is also questionable whether the condition had not so essentially changed, even under the local laws of the slaveholding colonies or States, that the slave was no longer property, but a person owing service in a relation to another person.<sup>2</sup>

§ 681. And if it is urged that, though the chattel character of slavery is now not recognized in jurisprudence, yet the right of the master to the services of his slave, is a property, because it is valuable or may be bought and sold,<sup>3</sup> it must be replied that it cannot be property beyond the sphere of the local law which enforces the obligation of the slave.<sup>4</sup> The provision must be interpreted or construed like a treaty, and if the question turns upon what is *property*, there is but one standard of property as between independent communities—that is, universal jurisprudence, exhibited in the international intercourse of all civilized nations, and particularly in the law of commerce.

Besides, on general principles of interpretation, it may be objected to this argument that it proves too much; it would make every valuable right existing by the local law one which could be protected by this provision.

<sup>1</sup> *Ante*, § 308.

<sup>2</sup> *Ante*, §§ 283, 284.

<sup>3</sup> Which is Judge Clerke's proposition, *ante*, pp. 363, 364.

<sup>4</sup> Compare, *contra* Mr. O'Connor's argument, 20 N. Y., 573. If it is said that it is property in view of this provision because, by the provision, the local law of property in respect to slaves is taken up and carried beyond its original habitat—this is reasoning-in-a-circle.



§ 682. And if, again, it is said that the Constitution in other places recognizes the existence of those rights of mastership and the corresponding obligations which enter into that state which we call slavery—that therefore the Constitution recognizes the property which the master has by State law, generally, or beyond the instances specified in that instrument—the argument is simply a fallacy, which has been already indicated.<sup>1</sup>

Besides, these very clauses of the Constitution, recognizing the right of a slave-owner, being a citizen of a State, to the custody of his slave in the instance of his escape, are an argument against this claim, on the general rule—*expressio unius est exclusio alterius*.<sup>2</sup>

§ 683. The claim of the slave-owner, being a citizen of some State of the Union, can be supported by this provision only in that case in which it would at the same time be recognized by the private international law resting on the authority of the several State. The question whether such claim is now supported by law, in the so-called free States, will be properly considered in another chapter. But it is here to be noticed that, whether the unwritten private international does or does not support that claim in any State, it is a law subject to the legislative action of the State, and the judicial tribunals are bound to take the law as given by the legislature. For, as above stated, the reserved powers of the State are not limited in this respect by any part of the Constitution.

§ 684. Independently of the question whether the absolute slavery of negroes may be supported under this provision, a question regarding the maintenance under it of other bond conditions might arise. There are probably no cases in which the claim of a master to the custody of a fugitive minor apprentice has been claimed as specifically guaranteed by this provision. Even if not comprehended under the provision respecting fugitives, it would seem that it might, as a well-known common-law relation<sup>3</sup> which, as such, must have been customarily recognized in the colonies and States, be supported by this provision.

<sup>1</sup> *Ante*, § 507.

<sup>2</sup> See *passim*, in the cases referred to, *ante*, p. 358, note 1.

<sup>3</sup> *Ante*, § 249.

§ 685. It will be remembered that whatever may be the true interpretation of these clauses, as indicating certain persons and certain rights, the question arises of the operation of the provision, or—in what manner are the ends contemplated by it to be attained? The question then arises of the character of the provision, as either public or private law; that is—who are the persons upon whom, as a rule of action, it operates?

This, as has been indicated, is a question of construction, as distinguished from interpretation.<sup>1</sup> Without attempting to indicate each of the several constructions which might possibly be given to this provision, it is enough to say that it is either, 1—a rule acting on the States as political persons, creating a duty in them to do or to forbear doing something in respect to the citizens of each other State; or it is, 2—a rule acting on private persons, and affecting the rights and obligations of the citizens of each State in certain relations with other persons.

If the provision has the character first described, it will depend upon the existence of other provisions in the Constitution whether it may be made to operate on private persons with the authority of national municipal law, or whether its legal operation must be sought in that law which, in authority and extent, is the local law of a several State.

But, if the character of the provision is that secondly above described, the provision is itself part of the national municipal private law which must be applied by all tribunals exercising the judicial power of the United States, and also by State tribunals exercising concurrently the judicial power of the State under the Sixth Article of the Constitution; while each State in the exercise of its reserved powers is at the same time prevented from infringing the rights accorded by the provision to private persons, and State laws, in their application to citizens of other States, must be subject to judicial power applying this part of the Constitution as public law.

§ 686. It is first proper to look for legislative constructions of this provision. And here the utter absence of any legisla-

<sup>1</sup> *Ante*, § 601.



tion either State or national, for the purpose of carrying this provision into effect, is, negatively, an index of its construction. Congress has not hitherto passed any law expressly designed to maintain the privileges and immunities of citizens appearing as domestic aliens in any State. But neither, on the other hand, have the State legislatures ever deemed it necessary for them to pass laws to secure those privileges and immunities.

But the mere fact that the citizens of the several States have enjoyed some of the privileges and immunities of citizens in the other States, is not of itself any positive index of its construction, because it does not appear but that the same privileges and immunities would have been equally enjoyed by the same persons had there been no such provision.

§ 687. There are only a few judicial dicta which can be referred to on this question, besides those which may be contained in the opinions already cited in this chapter.

A part of the opinion written by Chief Justice Hornblower, of New Jersey, in 1836, in *Himsley's case*, will hereinafter be noted, in which he maintains that Congress has no power of legislation in reference to any of these provisions, except the first section of this Article, and that only by the express grant of power contained in it. He appears to give to all these provisions the first of the four constructions already indicated.<sup>1</sup>

In *Miller v. McQuerry* (1853), 5 McLean, 477, Judge McLean, in a charge to the jury, sustaining the power of Congress to legislate in reference to the fugitive-slave provision, said:—"The Constitution provides that full faith and credit shall be given to the public acts, &c., of one State in every other. If an individual, claiming this provision as a right, and a State court shall deny it, on a writ of error to the Supreme Court of the Union such judgment would be reversed. And the provision that the citizens of each State shall be enti-

<sup>1</sup> *Ante*, p. 358. In this opinion, Judge Hornblower, in supporting his construction by views of political expediency, says:—"Legislation by Congress, regulating the manner in which a citizen of one State should be secured and protected in the enjoyment of his citizenship in another, would cover a broad field, and lead to the most unhappy results." See the fuller citation of the opinion, *post* in Ch. XXVI. The occasion of the opinion is described, *ante*, p. 64.



tled, &c., Congress unquestionably may provide in what manner a right claimed under this clause and denied by a State may be enforced. And if a case can be raised under it, without any further statutory provisions, so as to present the point to the Supreme Court, the decision of a State court denying the right would be reversed."<sup>1</sup>

Judge Smith, of Wisconsin, in *Booth's case*, 1854, 3 Wisc. 35, asks:—"What would be thought by the people of this country, should Congress pass a law to carry into effect that clause of the fourth Article in regard to citizenship?"

In Chief Justice Taney's opinion in *Dred Scott's case* there are one or two passages bearing on this question. They are to be found in the citations already given. The principal observations are those on p. 423 of the report, in the first paragraph, given also in p. 296 of this volume, in the first paragraph. The other is on p. 425 of the report, in a passage cited on p. 347 of this volume, describing the consequences of recognizing the younger Darnal as a citizen.

From these dicta it may be inferred that Judge Taney would construe the provision as private law creating rights and obligations in relations between private persons, and hold that those rights, as "the privileges and immunities of citizens" intended, may be maintained by the national judiciary, irrespectively of the juridical action of the State in which the citizens who may claim them shall appear.

In the cases of *Bushnell and Langston* (1859), 9 Ohio, 75, where the power of Congress to legislate for carrying out the fugitive-slave law was sustained by a majority of the court, Brinckerhoff, J., in his dissenting opinion, *ib.* 225, says of this provision and that for the surrender of fugitives from justice:—"That these clauses are mere articles of compact between the States, dependent on the good faith of the States alone for their fulfillment, I suppose no one will dispute. They do not confer upon Congress any power whatsoever to enforce their observance." *Sutliff, J.*, in the same case, *ib.* 231-237,

<sup>1</sup> It should be remembered that this was said only in a charge to a jury. The whole is very carelessly put together. Judge McLean did not here even notice the fact that a power had been specially given to legislate in reference to the proof and effect of acts, judgments, &c.

also denies power in Congress to legislate, and appears to regard the provision as a law acting on the States as its subjects.<sup>1</sup>

§ 688. The question, whether Congress or the States have the power to legislate for the purpose of carrying this provision into effect, depends upon the view taken of it as public or private law. Four views or constructions, which it is supposed might be advanced in reference to any of these provisions, have been stated in another chapter. It would appear that, under any construction, the provision should act as a limit to the legislative power of the States, and might be applied by the judicial power of State courts in the first instance, or of the Supreme Court of the United States in the last resort, in declaring void any State law in conflict with it. But whether a case could arise under this provision, which would be within the judicial power of the United States, as a case "arising under the Constitution" of the United States, and not as a case arising between certain parties,<sup>2</sup> would appear to depend on this question of construction, as does also the legislative power.

§ 689. As already remarked, there is apparently no necessity for supposing that a similar construction, in respect to the persons upon whom they operate, should be given to each of these provisions.<sup>3</sup> But it seems to be generally assumed in all arguments on the subject, that it must be presumed that the principles which may be applied to the construction of any one should be equally applicable to the construction of another. For this reason, the authorities on the construction of the other provisions should be examined as guides in the construction of that which is the subject of this chapter.

But, without entering fully into the question of the construction of this provision, it may be argued, consistently with views to be presented in connection with the construction of other provisions of this Article, that the last of the four con-

<sup>1</sup> See also the citations from these opinions in Ch. XXVI.

<sup>2</sup> *Ante*, Vol. I., p. 432. Mr. O'Connor, arg. 20 N. Y. 581:—"It is a curb set on State legislation, harmonizing with the provision which extends the ægis of the federal judiciary to the non-resident citizen in all controversies between him and the citizens of the State in which he may be temporarily sojourning."

<sup>3</sup> *Ante*, § 603.

structions which have been mentioned is that which harmonizes best with the general character of the Constitution ; that on the principle of the continuation of private law this provision may be supposed to have been intended to supply a law of *national authority*, and *quasi-international effect*, in the place of that law of individual rights for persons of white or European race, which, in the colonies, was maintained by the national or imperial authority, operating equally in every part of the empire, and which maintained those rights in the case of any such person, even against the local authority of any colony or several jurisdiction.

This law would indeed have continued, had the Constitution contained no such provision, to be judicially applied in each State to determine the rights of persons appearing therein as domestic aliens, until it should have been changed under the juridical authority of the State, either by positive legislation or judicial modification of unwritten law. But it may perhaps be said that it would have ceased to have its former extent, since the States, but for these provisions of the fourth Article, would have equal authority over all persons within their limits, whether domiciled inhabitants or domestic aliens. The international recognition of the rights of domestic aliens would, in each State, have depended upon its several will and autonomic recognition of international obligation, and the only private international law which could have been judicially recognized as applying to persons domiciled in another State would have been that which, in its authority, was identified with the local municipal law.<sup>1</sup>

<sup>1</sup> That is, this would have been the theory of the public law (*ante*, § 436). But whether there ever was a period when a State would have been patiently allowed to treat the other States as foreign countries may be doubted. See *ante*, n. 3, on p. 353.



## CHAPTER IV.

OF THE DOMESTIC INTERNATIONAL PRIVATE LAW OF THE UNITED STATES. THE SUBJECT CONTINUED. OF THE SECOND AND THIRD PARAGRAPHS OF THE SECOND SECTION OF THE FOURTH ARTICLE. OF THE PERSONS WHO MAY BE DELIVERED UP AS FUGITIVES FROM JUSTICE OR FROM LABOR.

§ 690. The second and third paragraphs of the second section of the fourth Article of the Constitution are as follows:—

“2. A person charged in any State with treason, felony, or other crime, who shall flee from justice, and be found in another State, shall, on demand of the executive authority of the State from which he fled, be delivered up, to be removed to the State having jurisdiction of the crime.”

“3. No person held to service or labor in one State under the laws thereof, escaping into another, shall, in consequence of any law or regulation therein, be discharged from such service or labor; but shall be delivered up on claim of the party to whom such service or labor may be due.”

§ 691. The general object of the first of these provisions is the enforcement of State laws which require actual custody of the person. In the additional territorial extent which it communicates to such laws, it modifies the enjoyment of the individual right of personal liberty. But its general effect, as auxiliary to the administration of the criminal law of the States, is a topic beyond the scope of this treatise. A state may however propose, by punitive laws, to secure the maintenance of any particular status or personal condition. Thus the abduction of a free person, except in the maintenance of rights incident to the relation of family, is in every country a criminal act, and, in the common law of England and America, is known as the crime of kidnapping. So, in countries where involuntary servitude exists, the law punishes the act of con.

veying away slaves, either with or without their consent, and whether with the intent to transfer them as property to other jurisdictions or with the intent to place them in jurisdictions where involuntary servitude is not lawful; the act being in either case felonious by the law of the slaveholding state, and, in the slaveholding States of the Union, punishable under special statutes. From the abstract of State legislation given in earlier chapters, it appears that there are a variety of acts punishable under the statutes of some States which are rendered possible only by the existence of a slave or disfranchised class, and that, in some non-slaveholding States, the forcible assertion by a person from another State of his claim in respect to a fugitive from service or labor may be declared subject to punishment.

In the extent which this provision may give to such laws it is then directly connected with the subject of personal condition. There are, moreover, certain obvious resemblances between this provision and that which follows it, respecting fugitives from labor, and, in the authorities which must be cited in the examination of the latter, the two provisions have so often been considered analogous that the examination of the first is incidental to that of the second, under the view herein taken.

§ 692. The questions which arise under these provisions, regarded as parts of the private law of the United States, are—

1. What rights and obligations of private persons are incidental to the relations created by these provisions?
2. By what means are these rights maintained and these obligations enforced?

These questions involve an inquiry into the *subjection* (to one or the other of the two several possessors of sovereign powers in each State of the Union—the several State or the government of the United States) of the private persons entitled to such rights, or owing such obligations.

According to what has already been stated respecting the international character of these provisions, this inquiry will lead to the adoption for each clause of one of those four constructions (or views derived by construction as distinguished

from interpretation) which have already been presented as possibly applicable to all or most of the provisions of the fourth Article.<sup>1</sup>

But whichever of these constructions may be put upon either of these two clauses of this Article, it is plain that, in the relations created or maintained by either, certain natural persons are designated as the objects of action or the objects of a right of action.<sup>2</sup> Under any one of these constructions, therefore, the question arises—

What persons may be delivered up as fugitives from justice or as fugitives owing service or labor?

The examination of each of these clauses may then be distributed under the two following inquiries :

1. Who, in each, are the persons who are the objects of the rights guaranteed by the provision?

2. By what means are these provisions to be made operative upon private persons?

It is evident that the questions above stated arise immediately on the provisions themselves, independently of any statute passed by Congress or by the States for the purpose of maintaining rights or enforcing obligations supposed to be created by these provisions. But in order to determine either question, it is necessary to refer to the authorities on these points, and these are to be found in the national and State legislation having this object; in the cases which have arisen under such legislation; and in other more or less authoritative discussions of its constitutionality. The various State statutes which have a bearing on these questions have already been enumerated; but their constitutionality, in reference to the national law, has been judicially examined only in connection with the constitutionality of the statutes enacted by Congress.

The first of the questions before stated must therefore be considered in connection with the similar inquiry arising under the laws of Congress. The second question will involve an inquiry into the proper construction of these clauses and the question of the constitutionality of the laws of Congress. In

<sup>1</sup> *Ante*, p. 236.

<sup>2</sup> *Ante*, §§ 23, 24.



consequence of the real and supposed analogies between the two provisions, which have been alluded to, it will be convenient to consider the first question in its application to each provision, before taking up the second question.

§ 693. The first of these questions is to be considered in the remainder of this chapter. As particularly directed to the first of these constitutional provisions, it is—

Who are the persons who may be the objects of the demand and delivery contemplated by the provision and by the first and second sections of the act of Congress of 1793, which are the only enactment of the national legislature on this subject?

This will be determinable in part by the force of the words "treason, felony, or other crime." In a demand under this clause, the law of the State in which the act charged was committed must of course have characterized it as treason, felony, or other crime. If the law of the State into which the person demanded may have fled should have given the same character to such act, it may be presumed that the correspondence of the demand with the provision, in that requisite, will not be matter of dispute between the two States; even though the act charged should be punishable by the law of no other State. But it is evident that the act charged as such, by the law of the State wherein it was committed, may be one which, in the State into which the person claimed has fled, is not known as an act subject to legal penalties. In such case the question must occur—by what legal standard is the extent of these words in the provision and the character of the act charged as "treason, felony, or other crime," to be determined? Some disagreement on this question would seem inevitable between States of this Union, when one may by punitive laws propose to secure a condition of bondage or civil disability unknown to the law of the other, and when one may ascribe liberty of condition to all and protect its enjoyment by all within its jurisdiction without reference to rights claimed, by another State, as belonging under private international law to its citizens in respect to their escaped slaves.

<sup>1</sup> See the act noted *post*, in the beginning of Ch. XXVIII.

§ 694. There are a number of decisions in cases involving a judicial consideration of the force of these terms. But there has been, I believe, no case of this kind, wherein the act charged as being within the scope of these words was one whose character would thus be differently regarded under the punitive laws of States thus differing in their respective laws of personal condition, earlier than the recent case on petition for a mandamus in the Supreme Court of the United States, December Term, 1860, entitled—*Ex parte*: in the matter of the Commonwealth of Kentucky, one of the United States of America, by Beriah Magoffin, Governor, and the Executive Authority thereof, Petitioner, *v.* William Dennison, Governor of the State of Ohio. The case is not as yet reported. The extracts here given from the opinion of the court, pronounced by Chief Justice Taney, are from a printed copy received from the clerk's office. In the opinion no mention is made of the circumstances on which the case arose. From the documents in the Governor's special message to the Legislature of Ohio, of Feb. 12, 1861, it appears that Willis Lago was claimed by the Governor of Kentucky, May 31, 1860, as charged with "the crime of assisting slaves to escape."

On the question, whether the act charged was a crime within the meaning of the Constitution, the Chief Justice says:—

"Looking to the language of the clause, it is difficult to comprehend how any doubt could have arisen as to its meaning and construction. The words 'treason, felony, or other crime,' in their plain and obvious import, as well as in their legal and technical sense, embrace every act forbidden and made punishable by a law of the State. The word 'crime' of itself includes every offence, from the highest to the lowest, in the grade of offences, and includes what are called 'misdemeanors,' as well as treason and felony. (4 Bl. Com., 5, 6, and note 3, Wendell's edition.)

<sup>1</sup> In the indictment, the grand jury "accuse Willis Lago, a free man of color, of the crime of assisting slaves to escape, &c., committed as follows, viz.: The said Willis Lago, free man of color, on the 4th day of October, 1859, in the county aforesaid, not having lawful claim, and not having any color of claim thereto, did seduce and entice Charlotte, a slave, the property of C. W. Nuckols, to leave her owner and possessor, and did aid and assist the said slave in an attempt to make her escape from her said owner and possessor, against the peace and dignity of the Commonwealth of Kentucky."



"But as the word crime would have included treason and felony, without specially mentioning those offences, it seems to be supposed that the natural and legal import of the word, by associating it with those offences, must be restricted and confined to offences already known to the common law and to the usage of nations, and regarded as offences in every civilized community, and that they do not extend to acts made offences by local statutes growing out of local circumstances, nor to offences against ordinary police regulations. This is one of the grounds upon which the governor of Ohio refused to deliver Lago, under the advice of the attorney general of that State.

"But this inference is founded upon an obvious mistake as to the purposes for which the words 'treason and felony' were introduced. They were introduced for the purpose of guarding against any restriction of the word 'crime,' and to prevent this provision from being construed by the rules and usages of independent nations in compacts for delivering up fugitives from justice. According to these usages, even where they admitted the obligation to deliver the fugitive, persons who fled on account of political offences were almost always excepted, and the nation upon which the demand is made also uniformly claims and exercises a discretion in weighing the evidence of the crime, and the character of the offence. The policy of different nations in this respect, with the opinions of eminent writers upon public law, are collected in Wheaton on the Law of Nations, 171; Foelix, 312; and Martin, Vergè's edition, 182. And the English government, from which we have borrowed our general system of law and jurisprudence, has always refused to deliver up political offenders who had sought an asylum within its dominions. And as the States of

<sup>1</sup> The mention of treason and felony makes it obvious that the provision extends to some cases not within the international rule of extradition. But does it appear from this that there is no restriction on the word *crime*? or that it, by itself, is not to be interpreted by that rule? Does not the specification of treason and felony, though coming under the general term crime, warrant the inference (by *expressio unius*, etc.) that, by itself, it is to be interpreted by that rule which excludes political offences, and in which these terms of English law are not recognized? How, in this argument, which is that referred to by the Chief Justice in the preceding paragraph, is there any "mistake as to the purposes for which the words treason and felony were introduced?"



this Union, although united as one nation for certain specified purposes, are yet, so far as concerns their internal government, separate sovereignties, independent of each other, it was obviously deemed necessary to show by the terms used that this compact was not to be regarded or construed as an ordinary treaty for extradition between nations altogether independent of each other, but was intended to embrace political offences against the sovereignty of the State, as well as all other crimes. And as treason was also a 'felony,' (4 Bl. Com., 94,) it was necessary to insert those words to show, in language that could not be mistaken, that political offenders were included in it.<sup>1</sup> For this was not a compact of peace and comity between separate nations who had no claim on each other for mutual support, but a compact binding them to give aid and assistance to each other in executing their laws, and to support each other in preserving order and law within its confines whenever such aid was needed and required; for it is manifest that the statesmen who framed the Constitution were fully sensible, that from the complex character of the government, it must fail unless the States mutually supported each other, and the General Government; and that nothing would be more likely to disturb its peace, and end in discord, than permitting an offender against the laws of a State, by passing over a mathematical line which divides it from another, to defy its process, and stand ready, under the protection of the State, to repeat the offence as soon as another opportunity offered.

"Indeed, the necessity of this policy of mutual support in bringing offenders to justice, without any exception as to the character and nature of the crime, seems to have been first recognized and acted on by the American colonies," &c. Here the judge cites the provision in the New England articles of confederation,<sup>2</sup> and remarks: "It will be seen that this agreement gave no discretion to the magistrate of the government where the offender was found; but he was bound to arrest and deliver, upon the production of the certificate under which he was demanded.

<sup>1</sup> But the question seems to be, How shall *treason* or *felony*, within the meaning of the provision, be discriminated? Is it enough that an act be called treason or felony on the statute-book of the demanding State?

<sup>2</sup> *Ante*, Vol. I., p. 269, note [c].

"When the thirteen colonies formed a confederation for mutual support, a similar provision was introduced, most probably suggested by the advantages which the plantations had derived from their compact with one another. But as these colonies had then, by the declaration of independence, become separate and independent sovereignties, against which treason might be committed, their compact is carefully worded so as to include treason and felony—that is, political offences, as well as crimes of an inferior grade. It is in the following words:

"‘If any person, guilty of or charged with treason, felony, or other high misdemeanor, in any State, shall flee from justice, and be found in any other of the United States, he shall, upon demand of the governor or executive power of the State from which he fled, be delivered up and removed to the State having jurisdiction of his offence.’

"And when these colonies were about to form a still closer union by the present Constitution, but yet preserving their sovereignty, they had learned from experience the necessity of this provision for the internal safety of each of them, and to promote concord and harmony among all their members; and it is introduced in the Constitution substantially in the same words, but substituting the word ‘crime’ for the words ‘high misdemeanor,’ and thereby showing the deliberate purpose to include every offence known to the law of the State from which the party charged had fled.

"The argument on behalf of the governor of Ohio, which insists upon excluding from this clause new offences created by a statute of the State, and growing out of its local institutions, and which are not admitted to be offences in the State where the fugitive is found, nor so regarded by the general usage of civilized nations, would render the clause useless for any practical purpose. For where can the line of division be drawn, with anything like certainty? Who is to mark it? The governor of the demanding State would probably draw one line, and the governor of the other State another. And if they differed, who is to decide between them? Under such a vague and indefinite construction the article would not be a bond of peace and union, but a constant source of controversy

and irritating discussion. It would have been far better to omit it altogether, and to have left it to the comity of the States, and their own sense of their respective interests, than to have inserted it as conferring a right, and yet defining that right so loosely as to make it a never-failing subject of dispute and ill will."

In the portion of the opinion which will be cited in the next chapter the Chief Justice says: "This compact, engrafted in the Constitution, included and was intended to include every offence made punishable by the law of the State in which it was committed."

§ 695. There have been several instances in which these questions have been considered by the chief executive officers of the State governments, and their legal advisers, the State Attorneys-General, and they have been sometimes subjects of discussion in the State Legislatures. The decisions made in such cases cannot, however, be regarded as precedents having any binding force; and, indeed, it is difficult to see how, under the application which has hitherto been made of this provision, any rule of law, having a general authority in all the States, can be derived from any cases arising under it. The judicial opinions in which the effect of this provision has been considered have, with one exception, arisen on some actual custody which was claimed to be lawful under it. The case of *Kentucky v. Dennison* presents the only instance in which the action of a Governor of a State, in refusing to make the required extradition, has been brought before a court for review. In that case the Supreme Court of the United States decided that it had no power to issue the mandamus prayed for. The rules which may be drawn from the decisions of State courts of law, when, on habeas corpus, or actions for damages, they may have passed upon the lawfulness of custody under the authority of the Governors of States proposing to fulfill duties arising under this provision and the law of Congress, will be rules of local authority only, as part of the law of some one of the several States.<sup>1</sup>

<sup>1</sup> In no instance, I believe, has the decision of a State court in such a case been brought up before the Supreme Court of the United States.



There are some instances of controversy between the Executives of different States which may be particularly referred to as important in the history of the general subject, and as showing how far such questions are proper subjects for the exercise of the judicial function. Whether the provision itself should be so construed that it might be applied by the judicial power of the United States or of the several States, independently of national or State legislation, as part of the national private law, will be considered in the next chapter.

§ 696. The earliest instance of a question of this character, under this provision, arose in the year 1791, on a claim made on the Governor of Virginia for persons charged with having abducted a negro from Pennsylvania into Virginia to be holden in slavery.<sup>1</sup> The Governor of Virginia refused to deliver up the persons demanded. In the indictment the person carried off was designated "a free negro," and it was not even intimated in the opinion given by the Attorney-General of Virginia, or in the answer of the Governor of that State to the Governor of Pennsylvania, that he was a slave, or had been a slave in Virginia or in any other State. It does not appear to have been questioned that his right to freedom, in Pennsylvania, and to the protection of its laws, was as perfect in that State as the right, in that respect, of any other inhabitant. The principal reason given for the refusal of the demand appears to have been, that the law of Virginia should, in this instance, determine the meaning of the terms "treason, felony, or other crime," and

<sup>1</sup> Parties were charged under the State law of 1778. Gov. Mifflin, of Pennsylvania, addressed a letter to Beverly Randolph, then Governor of Virginia, informing him of the charge against the parties, and their flight into Virginia, and requesting that proper steps might be taken to have them delivered up as *provided for in the Constitution*. Gov. Randolph submitted the request to Mr. Innis, Attorney-General of Virginia, who held that, by law of Virginia, the acts charged were only trespass or breach of the peace, to which the parties, if indicted, might appear by attorney, and assumed "that in these respects the laws of Pennsylvania are assimilated to our own," and argued:—"If they are, then the offences stated do not appear to me to come within the description of crimes contained in the above-cited section of the federal Constitution." On the refusal, Mifflin transmitted the papers to President Washington, and argued:—"It is equally certain that the laws of the State in which the act is committed must furnish the rule to determine its criminality, and not the laws of the State in which the fugitive from justice happens to be." The President submitted the case to Edmund Randolph, then the U. S. Attorney-General, who delivered an opinion contrary to Innis', and held that the Governor of Virginia ought not to refuse. See the documents in *Am. State Papers*, Misc. Vol. I., 49.

that by that law such abduction and selling into slavery of a free person, at least if a negro, was not such crime nor felony.<sup>1</sup> There were in this instance, however, other questions involved which were equally effectual in determining the decision of the Governor of Virginia. In connection with these, the correspondence on this occasion will hereinafter be again referred to. The history of the case was laid before the second Congress, and it is supposed to have been the immediate occasion of the passage of the act of Feb. 12, 1793.

A similar controversy arose in 1818-1820 between the Executives of Indiana and Kentucky on a similar abduction from the former State of a negro woman.<sup>2</sup>

§ 697. A similar conflict of opinion, arising out of circumstances the very reverse of those of the former cases, was presented, on the demand of the Lieut.-Governor of Virginia, in Aug., 1839, upon the Governor of New York for the delivery of three persons, charged, on the affidavit of one Colley, of Norfolk, Va., with having feloniously stolen and taken away a negro slave, the property of said Colley.<sup>3</sup> In this controversy were involved other essential questions respecting the quality of the *charge* of an offence and of having fled from justice, which might be the foundation of a demand under the Constitution, and of the evidence on which it should be founded.<sup>4</sup> But the

<sup>1</sup> Although it does not appear in the correspondence, it can hardly be doubted that this was asserted on the ground that the negro abducted was claimed to be a fugitive slave.

<sup>2</sup> The correspondence in this case, and report of a committee of the Indiana Legislature, are annexed by the Governor of Ohio to his message to the Ohio Legislature, on Lago's case, already mentioned. From these documents it would appear that the woman abducted was claimed to be a fugitive slave, though the refusal of the Governor of Kentucky to deliver up those charged with the abduction is not based on that supposition. The committee of the Indiana Legislature vindicate the propriety of the State law (*ante*, p. 127), which requires the individual claimed as a fugitive from service to be proved such prior to his removal, and deny the power of Congress to legislate.

<sup>3</sup> Seward's Works, ii., p. 453, in letter to the executive of Va.:—"The offence charged in the affidavit before me is not understood to be that of kidnapping a person, by which he was deprived of his liberty, or held in duress, or suffered personal wrong or injustice, but is understood to mean the taking of a slave, considered as property, from his owner. If I am incorrect in this supposition, the vagueness and uncertainty of the affidavit must excuse my error."

<sup>4</sup> The charge rested on the affidavit of the owner, and the only evidence implicating the parties charged was the fact that they were negroes employed on the vessel in which, on sailing from Norfolk, the fugitive slave had secreted himself. Having been arrested in the city of New York, and being detained until the Governor's determination should be known, they were set at liberty after



principal point in the general discussion which arose out of this demand was the question, whether the act charged (admitting it to have been committed, and to have been felonious by the law of Virginia) was within the meaning of the terms felony or crime as used in the Constitution. In the letters interchanged between the Executives of the two States, it seems to have been agreed that the words should not apply to violations of law other than those for which persons could be demanded from states recognizing an obligation under customary international law to deliver up criminals on the demand of foreign governments, from whose justice they might have fled. The Executive of Virginia appears to have insisted that in these cases the law of the place where the act charged was committed should determine whether it was included in the extent of these terms. The Governor of New York held that the only acts intended are such as are criminal by the laws of all civilized countries, as well as by the law of the state upon which the demand might be made, and refused compliance with the demand in this case, on the ground that since slavery could not exist in the State of New York, the act charged could not be criminal by its law, nor, for a similar reason, was it known to the laws of most civilized countries as a crime.<sup>1</sup>

argument before Recorder Morris, on habeas corpus, on the ground that there was no evidence of their having violated any law of Virginia. 2 Seward's Works, 467.

<sup>1</sup> The letters of Governor Seward, of New York, containing statements of the most important arguments in the letters of the Governor and Lieut. Governor of Virginia, are given, under the title "Virginia Controversy," in Mr. Seward's Works, Vol. II., together with several messages to the Legislature respecting this case. On the points mentioned in the text, see particularly pp. 452, 467, 472, 475, 495. On page 452 Governor Seward argues:—"Can any State at its pleasure declare an act to be treason, felony, or crime, and thus bring it within the constitutional provision? I confess that does not seem to me to be the proper construction of the Constitution. After due consideration, I am of opinion that the provision applies only to those acts which, if committed within the jurisdiction of the State in which the person accused is found, would be treasonable, felonious, or criminal, by the laws of that State. I do not question the constitutional right of a State to make such a penal code as it shall deem necessary or expedient, nor do I claim that citizens of another State shall be exempted from arrest, trial, and punishment in the State adopting such a code, however different its enactments may be from those existing in their own State. The true question is, whether the State of which they are citizens is under a constitutional obligation to surrender its citizens to be carried to the offended State, and there tried for offences unknown to the law of their own State. I believe the right to demand, and the reciprocal obligation to surrender, fugitives from justice between sovereign and independent nations, as defined by the law of nations, include only those cases in which the



The abduction of a slave, which is contemplated in the argument of Governor Seward, is supposed to have taken place with the concurrence of such slave, and with the design of placing him in a jurisdiction where he would be free. But the reasoning on which a delivery of the persons charged in this case was refused would apply as well to a case where the slave had been enticed away and sold. It would not be the crime of kidnapping a free person, as known to the laws of New York.<sup>1</sup>

A similar question arose, in 1841, on a requisition made by the Governor of Georgia upon the Governor of New York for the delivery of one Greenman, charged, on affidavit, with having stolen, taken, and carried away a negro woman-slave, and also certain articles of wearing apparel, in violation of the laws of Georgia. From the representations made at the time, by the agent of Georgia, to the Governor of New York, it appears that the larceny charged was committed, if at all,

acts constituting the offence alleged are recognized as crimes by the universal laws of all civilized countries. I think it is also well understood that the object of the constitutional provision in question was to recognize and establish this principle in the mutual relations of the States, as independent, equal, and sovereign communities. As they could form no treaties between themselves, it was necessarily engrafted in the Constitution. I cannot doubt that this construction is just. Civil liberty would be very imperfectly secured in any country whose government was bound to surrender its citizens to be tried and condemned in a foreign jurisdiction for acts not prohibited by its own laws."

<sup>1</sup>The Virginia House of Delegates passed resolutions on this subject, which the Governor transmitted with a letter to the Governor of New York. In these it was argued, from the juxtaposition of the two provisions, that they are mutually auxiliary; that the first, for the delivery up of fugitives from justice, was specially designed to protect the rights of slave-owners in such cases (2 Seward's W. 476, 477). These resolutions and correspondence having been laid by the Governor of New York before the Legislature of that State, April 11, 1840, the judiciary com. of the Assembly reported, declaring the matter to be beyond the powers of the legislative body, but added:—"They believe the positions taken by the Governor of this State to be sound and judicious, and that his exposition of the meaning of the constitutional provision in question is the only one that can be given consistently with the sovereignty of the State and the rights of the citizens, while it is in strict conformity with our federal obligations to other States, and recognizes all the rights which were intended to be secured." No proposition was submitted for the action of the House, and the committee was discharged from the further consideration of the subject. 2 Sew. W. 469. The Legislature of 1842 were of a different opinion, and, April 11, passed resolutions already mentioned *ante*, p. 61, note. See Gov. Seward's message in reply, 2 Seward's Works, 433. Chancellor Kent, 1 Comm. 37, note, has said:—"In my humble view of the question, I cannot but be of opinion that the claim of the Governor of Virginia was well founded, and entitled to be recognized and enforced." See also the criticisms on Gov. Seward's argument in an article by Conway Robinson, Esq., in the *Southern Literary Messenger* for January, 1840.

by the act of inducing the slave, by presenting to her the prospect of living as a free person, to secrete herself on board a vessel bound to New York, in which the accused was a passenger, and that the apparel charged as stolen consisted of the articles of dress and ornament worn on the person of the fugitive. In support of the charge of larceny, the Governor of Georgia afterwards communicated the indictment of a grand jury against Greenman for harboring and concealing the slave, and for enticing her "to run away from her owner with the intention to appropriate the said slave to his own use, and to deprive the owner of the services of the said slave." Governor Seward's refusal to comply with the demand was, in his correspondence, based mainly on the position that the facts alleged were insufficient to support a legal charge of larceny, even according to the law of Georgia, and that the charge of kidnapping, as made by the indictment, was inconsistent with the other facts charged, or that there were "good grounds" in the case to induce the belief that the charge was "false and malicious." Governor Seward, besides this, expressly reserved the objection that the clandestine removal of the slave could not be recognized by him as theft, because property in human beings was not known to the local law of New York.<sup>1</sup>

§ 698. In 1847, requisition was made by the Governor of Maryland on Governor Shunk, of Pennsylvania, for John Mark, and others, as fugitives from justice, an indictment having been found against them under the law of Maryland, which enacts that the running away of a slave into any other State shall be felony.<sup>2</sup> The Governor refused to comply with the demand, on the ground that the Constitution and laws of the United States

<sup>1</sup> See Georgia Controversy, in 2 Seward's Works, 519. On p. 522:—"It may perhaps be unknown to your Excellency that while the kidnapping of a person by fraud or violence, or his abduction against his will, or any unlawful seizure of him or abridgment of his liberty, is regarded in this State as a high crime, it is held that the relation of master and slave, in other States, does not constitute a property in the person of the slave so as to render the slave a subject of theft from the master." P. 539:—"I beg leave to observe that I am not to be understood as conceding that a human being can, in law, be regarded as 'goods' and the subject of larceny. I respectfully reserve that question." The resolutions of the Virginia Legislature (*ante*, p. 10, n.) maintain that the provision goes beyond the requirements of international law, and affirm that "there is no civilized nation which has not within the 19th century recognized slaves as property."

<sup>2</sup> *Ante*, p. 22.



having embraced the case within the provision for the surrender of fugitives from servitude, no State legislation could evade those provisions or alter the character of the transaction, so as to include the case under the provision for the surrender of fugitives from justice.<sup>1</sup>

§ 699. In February, 1860, demand was made by Governor Letcher, of Virginia, on the Governor of Ohio, for Owen Brown and Francis Merriam,<sup>2</sup> under indictment in Virginia, "for advising slaves to rebel and make insurrection; for conspiring with slaves to rebel and make insurrection; and for conspiring with certain persons to induce slaves to rebel and make insurrection."

The refusal of the Governor of Ohio to make the required extradition was based upon the ground taken in the opinion of Mr. Wolcott, the Atty.-Gen'l of Ohio, that no evidence had been furnished of the flight from Virginia of the persons demanded. It seems to have been doubted, too, whether the Governor had power to make extradition in the absence of any authority specially conferred by the State.<sup>3</sup> No question as to the legality of slavery was raised by the Governor or the Attorney-General in this case.

In the case of Lago, already mentioned, the Governor based his refusal upon the opinion of the Attorney-General, that the act charged was not within the terms of the provision.<sup>4</sup>

<sup>1</sup> Rollin C. Hurd's *Personal Liberty*, &c., p. 601, and references.

<sup>2</sup> The persons demanded were supposed to have participated in the invasion or conspiracy of John Brown. A similar demand for others concerned was, I believe, made on the Governor of Iowa, and refused.

<sup>3</sup> *Ante*, p. 122, note. In his message to the Legislature, with the documents in this case and that of Lago, Gov. Dennison gives a letter of Hon. John W. Wright, Jan. 31, 1861, to the Governor of Indiana, describing the case of one Brown, a white man, who, in 1855, was "taken in that State from his own house without a requisition, on a charge of inviting slaves to leave Kentucky, and the proof of his guilt was a letter he wrote in Indiana to a man in Kentucky, and it was not pretended that any act had been done by him in Kentucky." Mr. Wright says that the Governor of Ohio "said and swore to it" that a requisition for the kidnappers of Brown would not be complied with. He also says, "When Governor Willard came into office I had a conversation with him on this case. He knew all the facts when they occurred, and he swore to me he would never deliver up an abolitionist from this side till they gave up kidnappers from Kentucky, and Willard often joked and told the compromise he had made."

<sup>4</sup> In his written opinion, April 14, 1860, Mr. Wolcott says:—"The question is thus presented, whether, under the federal Constitution, one State is under an obligation to surrender its citizens or residents to any other State on the charge that they



§ 700. The solution of these questions may be involved in that of the more general question—What may be treason, felony, or crime, in view of this provision?

It may be assumed, as admitted in the various opinions, that the legal nature of the act charged is to be determined either by the law of the State which makes the demand, or by that of the State in which the alleged fugitive is found, or in some criterion of national extent, common to all the States.

There are a few judicial opinions in which an answer to this general inquiry has been attempted.

In *Commonwealth v. Green* (1822), 17 Mass. 547, Parker, Ch. J., said:—"The Constitution has merely made that obligatory between the States which, between nations entirely foreign to each other, was done from comity, viz., the delivering up of criminals who have fled from justice." But it does not appear whether the judge would extend the operation of this clause only to cases like those in which extradition has been made as by international comity.

In the opinion of Savage, Ch. J., in *Clark's case* (1832), 9 Wend. 221, it is held that the standard of crimes for the commission of which international extradition may be made is not the measure of this provision; that it gives a "more perfect remedy; one which should reach every offence criminally cognizable by the laws of any of the States."<sup>1</sup>

In *Fetter's case* (1852), 3 Zab. 315, it is said by Green, Ch. J., that the provision "makes obligatory upon every member of the confederacy the performance of an act which previously was of doubtful obligation." But it does not appear whether the judge would limit the provision to cases in which extradition is

have committed an offence not known to the laws of the former, nor affecting the public safety, nor regarded as *malum in se* by the general judgment and conscience of civilized nations. This question must, in my opinion, be resolved against the existence of any such obligation. \* \* \* The right rule, in my opinion, is that which holds the power to be limited to such acts as constitute either treason or felony by the common law, as that stood when the Constitution was adopted, or which are regarded as crimes by the usages and laws of all civilized nations. \* \* This rule is conformable to the ancient and settled usage of the State." Mr. Wolcott adds that not even in every case which may apparently fall within the rules here asserted is the power of extradition to be exercised.

<sup>1</sup> The judge even says, *ib.* 219:—"It is not necessary, as under the comity of nations, to examine into the facts alleged against him constituting the crime; it is sufficient that he is charged with having committed a crime."

made by international law. It was held sufficient in this case that the act charged be larceny by the law of the demanding State, though not so at common law. *Ib.* 320.

In *Johnston v. Riley* (1853), 13 Geo. 97, 133, Warner, J., says the Executive is not authorized to "inquire whether, by the laws of his own State, the facts alleged would constitute *a crime in that State*; for we take it to be a well-settled principle that, by the law of nations, sovereignty united with the domain establishes the *exclusive* jurisdiction of a state or nation, within its own territory, as to *crimes* and to rights arising therein. This principle applies with peculiar force to the confederated States of the American Union, embracing as they do such a distinct variety of soil, climate, pursuits, and institutions. Such penal enactments as might be wholly useless in some of the States *are indispensably necessary* in others for the protection of property and the welfare of society."<sup>1</sup>

Nothing, or very little, is to be found on these questions in the writings of the leading commentators. Story's Comm. §§ 1807-1809, contain only an assertion of the salutary character of such a provision as a substitute for the ordinary extradition under international law. Kent, in 1 Comm. 39, has merely made a note of the controversy between Virginia and New York, giving his opinion as already noted. Mr. Rollin C. Hurd, in his *Personal Liberty, &c.*, p. 597, after a review of the cases, concludes that the provision embraces, "as a general rule, all such acts as are made criminal by the laws of the State where they are perpetrated."

§ 701. In whatever manner either of these clauses respecting fugitives may be construed, that is, whether it is taken to have the operation of national municipal private law, or that of an international agreement, it must, according to the view herebefore taken of the general character of this Article, be interpreted by rules applicable to international treaties or compacts as well as by such as apply to legislative acts.<sup>2</sup> Regarded as the

<sup>1</sup> The plaintiff had been arrested on charge of forgery in Pennsylvania. The opinion contains allusions obviously reflecting on the views taken in some of the non-slaveholding States of obligations arising under this provision.

<sup>2</sup> *Ante*, § 604. In the extract given, *ante*, p. 382, Judge Taney argued justly enough that, as extradition on charges for *treason* has not been granted under in-



legislative act of the integral people of the United States, it must be interpreted and construed with reference to laws which had before obtained within the same territorial jurisdiction under the political predecessors of that people. Regarded as an international compact, the standard of the interpretation of the words employed must be one common to the States as the constituent parties, and this standard must, as has been shown,<sup>1</sup> be found in the pre-existing law having international effect between the colonies and States; whether it was in authority identified with the national municipal law, by resting on the national power, or was international law only, such as customarily operates between independent states, binding them as a law in the imperfect sense.

§ 702. In whatever degree the provisions of this Article which have been already considered may extend or limit the local laws of the several States they, thereby, modify legal liberty, taking the words in the sense of all that may be done with the sanction of law. But it is evident that, so far as the local laws of the several States are to receive international recognition and extension by these provisions, they are laws which affect liberty in its more limited acceptation—freedom from corporal restraint. Having, then, regard to their character of private law, law determining rights of private persons, it is a principle of interpretation and construction to be borne in mind in considering them, or any legislation founded on their existence, that, being laws in restraint of personal liberty, they must be interpreted and construed strictly. This is a maxim of both the common law of England and of Roman jurisprudence, and which has always been recognized in the *criminal* jurisprudence<sup>2</sup> of all the States as a universal principle—one applying to all natural persons. It may be taken to apply in the interpretation of the first of these provisions, even if the presumption against the freedom of negroes which exists in

ternational law, the introduction of that word shows that the provision extends beyond the cases generally included "in compacts for delivering up fugitives from justice." He says:—"It is not to be construed by the rules and usages of independent nations in those compacts." But the question is, how are the words *treason* and *felony*, and *crime*, also, so far as not modified by the former words, to be interpreted? This must be by some international or quasi-international rule.

<sup>1</sup> *Ante*, §§ 605, 606.

<sup>2</sup> *Ante*, Vol. I. p. 382.



some of the States should be held to weaken its force in connection with the second.

§ 703. Another reason for a strict interpretation of these provisions may perhaps be found in the fact that, being international in their effect and calculated to maintain in one jurisdiction the law which is originally local and territorial in another, they are contrary to the general principle of the absoluteness of the power of each sovereign within his own jurisdiction. But this reasoning may not apply if, by a proper construction of these provisions, they are identified in authority with the national municipal private law, derived, on the theory herein assumed, from a possessor of sovereign power whose dominion extends over the United States as one jurisdiction. For since the powers of the United States and those of a single State are co-ordinate within such State, these provisions in resting on the will of the integral people of the United States may have in each State the character of municipal (internal) law, though they have an international effect.

So far as these provisions may contain a grant of power to a constituted government in any of the functions of sovereignty, there may be reasons for their strict interpretation and construction, founded upon other parts of the Constitution.

§ 704. It may be supposed that there are no reported cases of a *quasi*-international demand and extradition of criminals as between the North American colonies, since none such are cited in any of the learned opinions which have been delivered by American courts in cases arising since the adoption of the Constitution. In *Commonw. v. Deacon*, 10 S. & R. 129, Tilghman, Ch. J., said that "prior to the American revolution a criminal who fled from one colony found no protection in another; he was arrested wherever found, and sent for trial to the place where the offence was committed."<sup>1</sup> There are some English authorities from which it may be inferred that such *quasi*-international extradition was commonly recognized as legal in all parts of the empire.<sup>2</sup> But it is not clear whether

<sup>1</sup> See *ante*, Vol. I. p. 229, n. 1.

<sup>2</sup> In the Habeas Corpus Act, 31 Car. 2, c. 2, it is enacted that no subject of this realm shall be sent prisoner to foreign parts. But, in sec. 16, there is the proviso, "If any person or persons, at any time resiant in this realm, shall have committed

this *quasi*-international extradition was judicially supposed to take place under a law applying exclusively to the British empire and only in the case of persons who had committed offences in some one of its different jurisdictions, or was regarded as the effect of international law, supposed to obtain among other civilized nations, and law which would also warrant the delivery to foreign governments of persons charged with having committed crimes in other countries.<sup>1</sup> The distinc-

any capital offence in Scotland or Ireland, or any of the islands, or foreign plantations \* \* where he or she ought to be tried for such offence, such person or persons may be sent to such place, there to receive such trial in such manner as the same might have been used before the making of this act." In *Rex v. Warner* (three years before the *Hab. Corp. Act*), 3 Keble, 560, on motion "to set aside a rule for habeas corpus directed to the Lieutenant of the Tower, the defendant being there for murder in Barbadoes," &c.,—from the language of Hale, Ch. J., it may be inferred that it was lawful in such case to send the accused to the colony for trial. In *Lundy's case*, 2 Ventris, 314, anno 2 William and Mary, the judges gave their opinion, at the order of the king and Council, whether the criminal, who had committed treason, escaped to Scotland and thence had been brought to England, could be sent to Ireland, "Whether, admitting he were guilty of a capital crime by martial law, committed in Ireland, he might be sent thither from hence to be tried there, in regard to the act of habeas corpus," reciting the above clause and the proviso. "The judges unanimously gave their opinion that there was nothing in the Habeas Corpus Act (supposing he had committed a capital crime by law martial in Ireland) to hinder his being sent thither to be tried thereon. Note a case of sending to Barbadoes, *tempore* Hale, Ch. J." (i. e., *Rex v. Warner*, above.) In *Rex v. Kimberly* (3 Geo. 2), Strange, 848; S. C. Fitzgibbon, 111 and 1 Barnardiston, 225, the prisoner had been committed by a justice of the peace to be carried to Ireland to be tried "for marrying an heiress in Ireland against her consent, which offence is made a felony," &c., and the court thought proper to remand the prisoner. In *East India Co. v. Campbell*, 1 Vesey Sr. 246 (1749), it is said by the court, "One may be sent from England to Calcutta to be tried there for an offence."

13 Geo. 3, c. 31 (1773), recites that, Whereas it frequently happens that felons and other malefactors in England escape into Scotland, and other malefactors in Scotland escape into England, "whereby their offences often remain unpunished, there being no sufficient provision by the laws of either of the two parts of the United Kingdom for apprehending such offenders and transmitting them into that part of the United Kingdom in which their offences were committed. For remedy whereof" provides that arrests may be made in either part of the Kingdom of such persons escaping from the other, upon the warrant of a justice of the peace, and on the authority thereof transferred. This statute may reasonably be taken to determine more particularly the mode in which the existing law of extradition should be carried out. In *Mure v. Kay* (1811), 4 Taunton, 37, on question of an arrest made in Scotland, without warrant or any requisition from the other jurisdiction, on suspicion of a forgery committed in England, Lord Mansfield said, "that the power of arrest in such a case extended over every part of the king's dominion."

<sup>1</sup> It is here supposed that the law which should have determined the question in these cases was the *domestic international* law of the British empire. In some English cases this question has not been distinguished from the similar one arising under *foreign international* law. In *Mure v. Kay*, 4 Taunton, 37, on question of an arrest made in Scotland for forgery in England, Heath, J., supported it by the argument:—"In Lord Loughborough's time the crew of a Dutch ship mastered



tion would be important here, because it has been a question in international law whether it requires the extradition of criminals of any degree of guilt;<sup>1</sup> and it seems to be admitted that such a rule, if it exists, extends only to persons who have committed acts which are considered atrociously criminal in the jurisprudence of all civilized countries. If this *quasi*-international extradition between the different parts of the empire was not limited by the same standard, still from the English authorities it seems probable that it obtained only in case of persons charged with crimes capitally punished by the English code of criminal law. This, if it can be established, seems to be the only characteristic of the intercolonial usage which can be referred to in determining the extent of the words of the constitutional provision.

the vessel and ran away with her and brought her into Deal, and it was held we might seize them and send them to Holland, and the same has been the law of all civilized countries." In *Rex v. Kimberly, Barnardiston*, 225, Sergeant Corbet mentioned *Rex v. Hutchinson*, 3 Keble, 785:—"On habeas corpus it appeared that the defendant was committed to Newgate on suspicion of murder in Portugal, which, by Mr. Attorney, being a fact out of the king's dominions, is not triable by commission, upon 35 H. 8, cap. 2, § 1, N. 2, but by a constable and marshal, and the court refused to bail him." The statute 35 H. 8, c. 2, seems to have been the authority for trying persons in England for crimes committed in the colonies. See 1 Ventris R. 349: "Colepepper's case. He was indicted for high treason, for raising rebellion in Caroline, one of the king's foreign plantations in America. Whereupon he was term tried at the bar and acquitted." Note to the report: "By 35 H. 8, c. 2, foreign treasons may be either tried by special commission or on the king's bench by a jury of the county where that court sits. Vide Co. 1 Inst. 261, b. 3 Inst. 11." It was argued in *Rex v. Warner* (27 Car. 2); 3 Keble, 560, that the act "doth not extend to foreign murders within the countries of the king's jurisdiction, but of foreign countries. Hales, Ch. J., said that the statute doth extend to Ireland and other the king's jurisdiction as well as foreigners, and so is 1 Anders. 262, pl. 269." From the same case it may be gathered that the act extended to petty treasons. This practice was one of the colonial grievances, as is well known. Declaration of Independence:—"For transporting us beyond seas to be tried for pretended offences."

<sup>1</sup> See the various authorities in 1 Phillimore's Int. Law, §§ 362-364; Story's Conf. of L., ch. XVI.; 1 Kent's Com. 36, and the leading cases; *Commonwealth v. Deacon*, 10 S. & R. 125; *Commonwealth v. Green*, 17 Mass. 575; *Washburn's case*, 4 Johns. Ch. R. 106; *Holmes' case*, 12 Verm. 631; *Holmes v. Jennison*, 14 Peters, 540. Coke is an authority against this extradition, in a passage (which should have been cited in the first volume after § 258, on the question of fugitive slaves), 3 Inst. 180:—"It is holden and so it hath been resolved that divided kingdoms under several kings in league with one another are sanctuaries for servants or subjects flying for safety from one kingdom to another, and upon demand made by them are not by the laws and liberties of kingdoms to be delivered; and this, some hold, is grounded upon the law in Deuteronomy—non trades servum domino suo, qui ad te confugerit." In the case of slaves this rule should, it would seem, operate, whether slavery does or does not exist under the internal law of the forum. Mr. Wynne, *Eunomus*, Dial. 3, sec. 67, excepts to this dictum, as to criminals; and see *Tighlman, J.*, in 10 S. & R. 128.



§ 705. The Fourth of the Articles of Confederation, of 1778, was cited in the extract from Judge Taney's opinion.<sup>1</sup> The word misdemeanor, which is there used, or even high misdemeanor, might, if alone, be taken to mean an offence less heinous than one called a crime. But, by the use of the word *other*, it is classed with treason and felony. The same word *other* being retained in the provision in connection with the substituted word *crime*, in like manner seems to qualify that term by associating it with treason and felony.<sup>2</sup> But why was *crime* mentioned at all, unless to designate something which could not be classed with treason or felony?<sup>3</sup>

§ 706. As used in English jurisprudence, the word *felony* indicates some act to which a high degree of guilt, under the legal code of morals, is attached, and which is attended by a known degree of punishment.<sup>4</sup> *Treason* and *crime* are words not etymologically peculiar to the English language, and are popularly as well as technically used to designate violations of legal obligation which the state will punish irrespectively of remedies which the law may give to private persons. In *treason*, the public or political character of the right which has been infringed by the act so designated is indicated. In *crime*, an injury to either public or private rights may be implied.<sup>5</sup> Between parties equally inheriting the language of English jurisprudence a question of the etymological meaning of the words cannot be made. The question of the application of the words must really be a question of the existence of the obligations whose violation may be treason, felony, or crime, and of the existence of the rights correlative to those obligations.<sup>6</sup> Hence some common standard of legal rights and obligations, which may be recognized irrespectively of the several laws of the different States, must be sought for to de-

<sup>1</sup> *Ante*, p. 384.

<sup>2</sup> *Dictum*, 31 Ver. 287.

<sup>3</sup> Edmund Randolph's Opinion in the Virginia and Pennsylvania case.

<sup>4</sup> 4 Bl. Comm. 94:—"Felony, in the general acceptation of our English law, comprises every species of crime which occasioned at common law the forfeiture of lands and goods." *A. v. B.*, R. M. Charlton's R. 228.

<sup>5</sup> *Clark's case*, 9 Wend. 212:—"An offence made indictable by statute is a crime within the meaning of the Constitution and laws of Congress on the subject." *Ib.* 222:—"Crime is synonymous with misdemeanor;—citing 4 Bl. c. 5.

<sup>6</sup> See the use of the term "subject matter," in *Greenough's case*, 31 Verm. 285.

termine what may be treason, felony, or crime, in view of this provision.

Such a standard can be developed only by the history of the laws of the colonies and States.<sup>1</sup> It seems competent to argue that the personal law of slavery and of property in respect to slaves had prevailed under the concurrent juridical action of all the colonies, and, in each, with the support of the imperial or national authority, until the revolution; that although, when property in slaves had ceased to be supported by universal jurisprudence, it was no longer supported by the national law having *quasi*-international extent, yet it continued in each colony as an effect of its local law, *jus proprium*, and, therefore, had the same jural character as before; that, even if it had, by one or more States, been abolished as being contrary to natural reason or justice, and not simply on the ground of expediency, yet such abolition was not, necessarily, a denial, even by such States, of its jural character in other States wherein it continued, or an assertion that in such States, also, it was contrary to natural reason or justice;<sup>2</sup> that, simply on the principle of the continuation of laws, it must be presumed, in an international compact, that the parties continue to recognize the jural character of each other's laws; that a presumption in favor of the jural character of relations established by the laws of other states is, in fact, one of the elementary or axiomatic principles of jurisprudence;<sup>3</sup> that, before an international compact should be interpreted on the ground that the jural character of slavery in the slaveholding States had been denied by the non-slaveholding States, some positive declarations to that effect, anterior to or contemporary with the formation of the compact, should be shown; that, so far from there being any such declarations, the written and unwritten jurisprudence of the non-slaveholding States contains many recognitions of the validity of the slave laws of the slaveholding States; and that, above all, the Constitution itself contains some provisions which, as national private law,

<sup>1</sup> By such a principle Governor Seward appears to have refused to deliver up a person on the charge, in Pennsylvania, of fornication; and another, charged in New Hampshire with adultery. 2 Seward's Works, 479.

<sup>2</sup> Compare *ante*, § 316.

<sup>3</sup> *Ante*, §§ 33, 119.



support, in certain circumstances, rights and obligations incident to slavery, and others which involve its recognition as an effect of the local (internal) law, by the national government, in such States as may have adopted it or allowed it to continue.<sup>1</sup>

§ 707. Such observations may apply to questions like those arising on the demands made upon Governor Seward for persons charged with the abduction of slaves from Virginia and Georgia. It does not appear to be a question whether the forcible abduction of a free negro, such as was charged on the part of Pennsylvania, in 1791, in the case cited, should be recognized as a crime within the meaning of this provision. Kidnapping is a crime at common law,<sup>2</sup> and also, without doubt, by the statutory enactment of every State, and it does not appear that the Legislatures or the judiciaries of any colony or State ever made any distinction of the act according to the color or race of the person stolen, kidnapped, or abducted.

If the person seized or removed should have been, by the laws of some other State, to whose law he had formerly been subject, a chattel-slave, or a bondman, it would still depend upon the several will of the State in which he should be so seized whether the act should or should not be a crime by its laws: unless the right to seize and remove in such case has been given by the Constitution of the United States. For, except as determined by that instrument, the status of such a person is always determinable by law resting on the several will of the State in which he may be found; and there is nothing in international law, acting on states or nations as its subjects, to qualify this assertion. This has in part been shown in previous chapters, and will be further maintained in another part of the work. Whether there is anything in the Constitution of the United States, having the authority of national law with international effect, to limit the power of the States in this respect so as to legalize such seizure and re-

<sup>1</sup> *Ante*, § 484.

<sup>2</sup> Raymond, 474. 4 Bl. Comm. 219:—"Kidnapping being the forcible abduction and carrying away of a man, woman, or child from their own country, and sending them to another."



removal of a slave, when it would otherwise be unlawful by the law of the State into which he may have escaped, is a question which will also hereinafter be fully examined.<sup>1</sup>

§ 708. It is apparent that the question of the extent of the terms of this provision may arise in many cases occasioned by violations of the penal codes of the slaveholding States. To say nothing of differences as to the rightfulness of property in slaves, or rights over persons in involuntary servitude, the laws forbidding the instruction of slaves and persons of color, laws to prevent speaking or writing against the policy or morality of laws sustaining slavery, and others of similar character, are not accordant with the juridical standard of right received in other States. But unless the solution of such controversies can be placed in the hands of the judiciary,<sup>2</sup> it seems impossible to arrive at any definite rule in such cases.

§ 709. The persons who may be demanded must also be *charged* with treason, felony, or other crime, and have *fled from justice*. It has been urged in some of the cases that the charging intended by the Constitution must be some formal accusation by the State through its appointed officers; or that the "justice" spoken of should be taken to mean the vindictory machinery of the law put in motion to pursue the offender, as distinguished from the law itself against which the person demanded may have offended; that until thus actually pursued he could not be said to have fled from justice, though he might have actually removed from the State in the apprehension that the pursuit would be made. The person holding the chief executive authority of the State is not an officer to whom the initiatory steps of that pursuit are assigned by the State law, though he may facilitate it when commenced, as by issuing proclamations for the apprehension of offenders. It would seem, from the statute and cases, that the demand of the Executive should be accompanied by some charge made by some other person, though a formal proceeding of a grand-jury or prosecuting officer of the State is not usually considered necessary. The oath of any private person professing

<sup>1</sup> See *post*, Ch. XXVII.  
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<sup>2</sup> See *Ante*, § 695.

to be cognizant of the offence alleged, such as would induce a magistrate of the place where the offence is said to have been committed to issue an ordinary warrant of arrest, has generally been held a sufficient charge;<sup>1</sup> and the fact that the person so charged had actually removed from the jurisdiction in which the offence was committed has been taken to be, in itself, a flight from justice.<sup>2</sup>

The person demanded must also have fled from the justice of the demanding State, by having therein committed the treason, felony, or other crime charged against him. However contrary the act charged may have been to the laws of the State making the requisition, it must also have been committed within its territorial jurisdiction.<sup>3</sup>

§ 710. The persons who may be demanded and delivered up as fugitives from justice are further described in this provision as being charged with treason, &c., in a State, demanded by the executive authority of such a State, on being found in another such State, and are required to be delivered up for the purpose of being removed to the State having jurisdiction of the crime. The question of the extent of the word *State*, in this clause, does not appear to have been raised in any of the

<sup>1</sup> Johnson v. Riley, 19 Geo. 133; Thornton's case, 9 Texas, 645,—Indictment found, or an affidavit, before a judge or magistrate, charging; which last was held sufficient in Johnston v. Vanamringe, 5 Bl. Ind. 311. In a portion of the Opinion in Kentucky v. Dennison, which will hereinafter be cited, Judge Taney intimates that charge implies some exercise of the judicial function; that the person must be "charged in the regular course of judicial proceedings."

<sup>2</sup> Compare, on these questions, Opinion of Edmund Randolph, Am. State Papers, Misc. I., 42; Gov. Fairfield's (of Maine) Opinion, in 6 Am. Jurist, 1st Series, 226. Hayward's case, 1 Sandford's N. Y. Superior C. R. 701, under the State law of 1839, ch. 350, is authority, by parallel, on these points. Whether a person may be arrested by judge's warrant, in view of a subsequent demand on the Executive, is a different question. This is allowed by judicial practice in some of the States. Dows' case, 18 Penn. 37; State v. Buzine, 4 Harrington, 375; Goodhue's case, 1 Wheeler's Cr. Cases, 427, S. C. 2 John. Ch. 198; Fetter's case, 3 Zab. 319. In some of the States this is authorized by special statute.

<sup>3</sup> Ex parte Smith, 3 McLean's R. 132. Fetter's case, 3 Zab. 320. Mr. Wolcott, Atty. Gen. of Ohio, in his Opinion of March 7, 1860, in case of Brown and Meriam, said:—"The necessity of insisting on rigid proof of flight will not be doubted by any one familiar with the fact that in some of the States a practice has grown up of demanding the surrender, as 'fugitives from justice from those States,' of persons who have never been within their limits, on the legal fiction of a constructive presence and a constructive flight." If the fugitive is already held on a charge of crime by the State from which he is demanded, he is not to be delivered up; but, if discharged on that charge, the Sheriff may detain him to be delivered on the Governor's warrant. Troutman's case, 4 Zabriskie, 634.



reported cases. Congress, in legislating, have, it must be assumed, taken the word in the Constitution to extend to the Territories. The District of Columbia is not mentioned in the Act of 1793, but an Act of 1801 (*ante*, p. 25) supplies the defect. The question of the extent of the word in this provision will hereinafter be further considered in connection with that of the same word in other clauses.

§ 711. Pursuing the method proposed in the commencement of this chapter, the inquiry is now to be taken up—

Who are the persons who may be the objects of the claim and delivery spoken of in the second of these provisions, and in the acts of Congress which have been passed to carry it into effect?

In this provision persons are described as "held to service or labor in one State under the laws thereof" and as "escaping into another." The precise extent of these descriptive words has never been considered by the judiciary, and the commentators have not attempted to define it. It would be superfluous to cite decisions here to show that the courts have constantly taken these words to include the slaves of the slave-holding States of the Union.<sup>2</sup>

§ 712. Under this provision, and the acts of Congress based on it, claims have been made by their masters for the delivery of minor white apprentices, fugitives from their indentured service under State laws. In *Boaler v. Cummines* (1853), 1 Am. L. Reg. 654, where a boy apprenticed in Delaware was claimed, under the law of Congress, Judge Kane, of the Eastern District of Pennsylvania, sustained the master's right, saying, "I know no words that could more clearly include apprentices." This is probably the only reported judicial decision on this point. Such claims appear to have been sustained by U. S. Commissioners in Massachusetts and in Connecticut.<sup>3</sup>

<sup>1</sup> It is here assumed that the acts of Congress may apply to all the persons included under the terms of this provision and to no others. The third and fourth sections of the law of 1793 were the only law of Congress on this subject before the act of 1850, and they were not repealed by the latter. The two acts will be found in notes to Ch. XXVIII.

<sup>2</sup> But it has sometimes been argued that the clause does not apply to those persons; as by Mr. Gerrit Smith on the trial of U. S. Deputy Marshal Allen, (*ante*, p. 40, n.) In *The Unconstitutionality of Slavery*, App. A., Mr. Lysander Spooner maintained the same doctrine.

<sup>3</sup> So stated in IV. Monthly L. R. 526, VI. ib. 178, 295. Judge Sutliff, in 9



In the case of *Van Orden*, in New York (1854), it was held by U. S. Commissioner Morton that such a claim could not be sustained under the provision.<sup>1</sup>

§ 713. Since legal relations consist of rights and correlative obligations, the idea of service or labor due, enters, it may be said, to a greater or less degree into every legal relation, and there is in every civil society a large class of relations in which the obligation due is specifically described as being a debt of some sort of service or labor to the person having the corresponding right.<sup>2</sup>

The extent of the terms here used must be limited by their reciprocal bearing, as well as by the general rules for the interpretation of all these provisions which have been already stated.<sup>3</sup> The words *held* and *escaping* express of themselves such a limitation of the relations in which this service or labor is here spoken of as due. The service or labor due must be such as arises from a condition of bondage, and may be specifically enforced by subjection to a personal control. It must be subjection to a private person in distinction from the subjection due to a State or the political representatives of that State. It must be service or labor in such a relation to the dominion of another that the term "escaping" would have been applicable to it in the language of the international law which had been previously recognized in the States which composed the Union. This excludes those services due on ordinary contract, under which the party held to render them must respond by the forfeiture of pecuniary damages in case of refusal to fulfill his obligation.<sup>4</sup> By this rule also the debt of service or

Ohio, 248, says:—"For the provision and the act of 1793, according to the opinions expressed by Daniel Webster, Chancellor Walworth, and others, apply as well to apprentices as to slaves. Indeed, I am not aware that a contrary opinion has ever been expressed by any jurist or statesman."

<sup>1</sup> Mr. Morton, in his opinion, given in the city newspapers of the day, held that "the word *person* in the Constitution and in the sense therein used, is synonymous with *slave*;" that the decision of the Supreme Court in *Prigg's* case "has rendered it now impossible to hold otherwise than that apprentices are wholly excluded from having been within the intention of the framers of the Constitution," &c.; that Story, J., in commenting on those clauses of the Constitution where slaves are referred to as persons, must be taken to support this view.

<sup>2</sup> The learned reader's recollection of the history of the great law-suit—*Poor Peter Peebles v. Plainstones*—may suggest to him the "fugie warrant" which Peter obtained in the English border county for the person of Mr. Alan Fairford, his counsel, as a fugitive from his service. See Scott's *Redguntlet*, Vol. I. ch. 7.

<sup>3</sup> §§ 604-606.

<sup>4</sup> *Ante*, § 143.

labor under the relations of the family may be excluded from the scope of this provision.

According to the historical exposition of colonial law, the only debt of service or labor which was internationally maintained between the several jurisdictions was that incident to the definite condition or status of involuntary domestic servitude and personal bondage. It has been shown that there were two kinds of bondage thus recognized, viz.: the condition of servitude of a legal person, under indenture for a term of years, and of chattel bondage or absolute slavery, which by the customary or common law at least could exist only in the case of persons of negro or Indian race. Whether any debt of service or labor incident to a condition distinct from these, in its legal nature or historical origin, could be recognized under this provision, may be questioned.

§ 714. The servitude, under indenture, of adult whites, has for a long time been unknown in this country. It might be urged that it was a peculiar incident of the period of colonization and the then-existing private international law, and, at the time of the adoption of the Constitution, was recognized as having only a residuary and temporary existence. Since its expiration, personal freedom, as a "natural" or "inherent" or "inalienable" right, seems to have been attributed by the common law of each State to every person of the white race.<sup>1</sup> Though it would appear to be within the power of any State to legalize it, by statute, within its own limits, it may be questioned whether it could be thereupon recognized in other States under this provision.

§ 715. It would appear that the claim of a master on the person of a minor, being a fugitive owing service and labor under indentures of apprenticeship in another colonial or State jurisdiction, must have always been allowed in the several colonies and States; either under common law, including the international private law, or under compacts for the delivery of runaway servants, like that contained in the New-England articles of confederation.<sup>2</sup> So that, on the principles herein adopted for the interpretation of these provisions, such a claim

<sup>1</sup> *Ante*, §§ 210, 211.

<sup>2</sup> *Ante*, Vol. I. pp. 269, 326.



should now be supported under this provision; even if it could not be maintained under the guarantee of the "privileges and immunities of citizens" according to the argument in the last chapter.<sup>1</sup>

§ 716. If the pre-existing international and *quasi*-international law, as set forth in the historical portion of this work, may be referred to, to interpret the terms of this provision, there can be no doubt of its application to persons of African race owing service or labor in those existing conditions of chattel-slavery, or domestic involuntary servitude, which, in some of the States, have been derived from the earlier *law of nations*, or universal jurisprudence.<sup>2</sup>

On the principle that when the meaning of written enactments is doubtful they may be construed from the intention of their authors as it may be gathered from history,<sup>3</sup> it is also proper to refer to the history of the formation of the Constitution and to the circumstances of the country as they are known to have presented themselves to the minds of those who framed and those who adopted the Constitution. The historical proof that this provision was intended to apply to negroes held in absolute slavery has, by the courts, been constantly regarded as overwhelming.<sup>4</sup>

<sup>1</sup> *Ante*, p. 371.

<sup>2</sup> In *Miller v. McQuerry* (1853), 5 McLean, 472, it was contended that no proof had been offered "that Kentucky is a State in which slavery is authorized by law;" that "there was no law in the South expressly establishing slavery" (relying probably on the dogma, *slavery exists only by positive law*). McLean, J.:—"With regret I hear this argument in this case. It was used by gentlemen of the South to justify the introduction of slavery into our Territories, without the authority of law." Then, quoting 15 Peters, 450,— "that slavery was local, and that it could not exist without the authority of law; that it was a municipal regulation," the judge adds:—"Whether this law was founded upon usage or express enactment, is of no importance. Usage of long continuance, so long that the memory of man runneth not to the contrary, has the force of law. It arises from long recognized rights, countervailed by no legislative action. This is the source of many of the principles of the common law of England. And this, for a century or more, may constitute slavery, though it be opposed, as it is, to all the principles of the common law of England. I speak of African slavery. But such a law can only acquire potency by long usage," &c. Here Judge McLean attributes negro slavery to *particular custom*, as defined in English law—a doctrine entirely different from that set forth in the historical exposition of the subject in this work, and incompatible with any recognition of slavery in the Territories, under any of the views presented *ante*, pp. 180–185.

<sup>3</sup> *Ante*, § 651.

<sup>4</sup> *Prigg's case*, 16 Peters, 611, 612, Story, J.:—"Historically it is well known," &c. U. S. Deputy Marshal Allen's case, Syracuse; Judge Marvin:—"All ancients history shows that this provision related to slaves." Pamp.



§ 717. By the same reasoning it would appear that any person of mixed race, descended from a line of female ancestors of negro or mixed blood, if held in involuntary servitude in a State, may be claimed and delivered up under this provision. For, by customary law, such persons may have been held as slaves in the colonies and States, however small the proportion of negro blood should have been.

It would seem that there is no correspondence between the discrimination of race in capacity and incapacity for citizenship, in view of the first provision of this section of the fourth Article,<sup>1</sup> and the discrimination of race in liability and non-liability to claim and delivery under this provision. Of persons having an equal admixture of negro blood, some may be citizens of a State in view of the first, and some may owe service or labor in view of the latter.<sup>2</sup>

§ 718. Supposing that the servitude of white adult persons, under State laws of indenture, should not be recognized under this provision,<sup>3</sup> yet, in the case of negroes, it should be remembered that in some of the colonies, or at least in some of the States at the time of the adoption of the Constitution, the chattel-slavery of negroes had become modified by a greater or less attribution of rights and a recognition of legal personality; that in late instances in other countries chattel-slavery has been transmuted into a so-called apprenticeship, under special statutes; and, to recur to more ancient periods in the history of slavery, the transition from an absolute chattel condition to a modified bondage has been the constant phenomenon of its decrease and extinction.<sup>4</sup> The debt of service or labor, in a relation derived through a modification or amelioration of an anterior chattel-slavery, though in many respects essentially different from it, should therefore, it would appear, be recognized under this provision. Indeed, as will hereinafter

Rep. p. 94. Judge Smith, in Booth's case, 3 Wisc. 16:—"Let it be taken for granted that this clause was intended to refer exclusively to fugitive slaves, of which, I think the history of its adoption into the Constitution leaves no doubt."

<sup>1</sup> *Ante*, p. 340.

<sup>2</sup> In the case of John Bolding, in August, 1851, in New York, before U. S. Commissioner Morton, an attempt was made to show that B. had no negro blood. The Commissioner held it incumbent on the claimants to establish, in the first place, that B. had African blood in his veins, and was, therefore, capable of being a slave. See N. Y. daily journals of that date.

<sup>3</sup> *Ante*, § 714.

<sup>4</sup> *Ante*, §§ 160-162.

be more fully argued,<sup>1</sup> whether the natural persons claimed under this provision are considered chattels or legal persons by the law of the State in which they had been held to service or labor, it is as legal persons only that they are known under this provision.<sup>2</sup> At what point, in the additive attribution of legal rights to a person formerly held as a chattel, the relation, or the service or labor due under it, would properly cease to be recognized under this clause, is a question which must be of some difficulty, but it is one for which there has been, as yet, no occasion for judicial inquiry.

<sup>1</sup> *Post*, in Ch. XXVII.

<sup>2</sup> If, as is held in the opinion delivered by Chief Justice Taney, as the Opinion of the Court in *Dred Scott's* case, it is as property only that slaves are recognized in this provision (*ante*, Vol I., p. 558), it would seem that only those who were absolute chattels, by the law of the State from which they had escaped, could be reclaimed under this provision. An argument similar to that of Mr. Com. Morton, with regard to apprentices, would apply equally to slaves. It is contended by some Southern writers that the slaves of the slaveholding States are even now recognized as legal persons. South. Quar. R., IX. p. 163:—"Our system of negro slavery is not perfect slavery, because the negro has in many cases a legal appeal from the judgment of his master, who is responsible to the law for cruel oppression, and must answer with his life for the life of his slave." See, also, Sawyer's Southern Institutes, 312; the Delaware cases, *ante*, p. 76, note; argument of Robert J. Walker, Esq., in *Groves v. Slaughter*, 15 Peters' Reports, Appendix, liv. In recent arguments it has been often said, that by the law of the slaveholding States the slave is both *person* and *property*. Mr. Cobb, Law of Negro Slavery, § 84, a. "In the Roman law, a slave was a mere chattel (*res*). He was not recognized as a person. But the negro slave in America, protected as above stated by municipal law, occupies the double character of *person* and *property*." But, in the very definition of persons and things it is necessary to contrast them. *Thing* is that which is not *person*, and *person* that which is not *thing*. Only things can be *property*, and legal persons must have some rights (*ante*, §§ 21, 44, 45). Slaves may be property in view of the law of a State, and legal persons in view of the national law (*ante*, § 507), for the two laws proceed from two distinct sources. It is a contradiction in terms to say that they are legal persons and property in view of one and the same source of law. The responsibility of slaves as natural persons must be recognized even when no rights are attributed to them; that is, where they are known as legal chattels. *State v. Thackum*, 1 Bay. 358. In No. 54 of the *Federalist*, Mr. Madison says:—"The true state of the case is, that they [slaves] partake of both these qualities; being considered by our laws, in some respects, as persons, and in other respects as property," and goes on to state their obligations in respect to others, under the law of a State, by which he says they "may appear to be degraded from the human rank and classed with those irrational animals which fall under the legal denomination of property." He then mentions in what respects a slave is regarded by the same law "as a moral person; not as a mere article of property." Then he says "the federal Constitution decides with great propriety on the case of our slaves when it views them in the next character of persons and property. This is, in fact, their true character. It is bestowed on them by the laws under which they live [*i. e.* the State law]; and it will not be denied that these are the proper criterion," &c. Here Mr. Madison argued on the fallacy which has been indicated, *ante*, § 507. It is not necessary to conclude that the Constitution regards slaves as property, even if the State does regard them as such, or as both persons and property. But this last is, besides, a legal impossibility.



§ 719. The intention of those from whom the Constitution derives its authority being shown, any objection to the validity of the provision founded on the ethical character of these conditions of involuntary servitude is irrelevant.<sup>1</sup>

§ 720. The persons who may be the objects of claim and delivery under this provision as further described as "escaping into another" State.

It has been urged that this description should include slaves who, having been brought by their owner into a non-slaveholding State, may refuse to remain with him or to return.

In *Butler v. Hopper* (1806), 1 Wash. C. C. R., 501, it was held by Washington, J., "Neither does the second section of the fourth Article" \* \* "extend to the case of a slave voluntarily carried by his master into another State, and there leaving him under the protection of some law declaring him free."

In *ex parte Simmons* (1823), 4 Wash. C. C. R., 396, "The evidence was that Mr. Simmons came to Philadelphia from Charleston, South Carolina, where he resided and has plantations, in February, 1822, and rented a house for one quarter, which he furnished and in which he continued to reside with his family for three quarters and six weeks; that he brought with him his slave as his property, who remained during that period, or the greatest part of it, in his service as a domestic, and who has remained in Philadelphia until the present time, without any attempt being made by his master to remove him back to South Carolina until the present application" [under

<sup>1</sup> Compare *ante*, §§ 7, 351. *Jones v. Van Zandt*, 5 How. 231, Woodbury, J.:—"Before concluding, it may be expected by the defendant that some notice should be taken of the argument urging on us a disregard of the Constitution and Acts of Congress in respect to this subject, on account of the supposed inexpediency and invalidity of all laws recognizing slavery, or any right of property in man. But that is a political question, settled by each State for itself; and the federal power over it is limited and regulated by the people of the States in the Constitution itself, as one of its sacred compromises, and which we possess no authority as a judicial body to modify or overrule. Whatever may be the theoretical opinions of any as to the expediency of some of those compromises, or of the right of property in persons which they recognize, this court has no alternative, while they exist, but to stand by the Constitution and laws with fidelity to their duties and their oaths. Their path is a straight and narrow one, to go where that Constitution and the laws lead, and not to break both, by traveling without or beyond them." See also *McLean, J.*, in *Vaughan v. Williams*, 3 McLean, 532; *S. C.*, 3 Western L. J. 67; *Shaw, Ch. J.*, 18 Pick. 219.



the 3d sec. of the act of 1793]. Judge Washington refused the certificate, on the ground that in this instance there was no "escaping" within the meaning of the Constitution, and reaffirmed the doctrine of the last case, adding, "The slave in this case having been voluntarily brought by his master into this State, I have no cognizance of this case so far as respects this application; and the master must abide by the laws of this State so far as they affect his rights. If the man claimed as a slave be not entitled to his freedom under the laws of this State, the master must pursue such remedy for his recovery as the laws of the State may have provided for him."

In *Commonw. v. Aves* (1836), 18 Pick. 219, Chief Justice Shaw said, "that, as by the general law of this Commonwealth slavery cannot exist and the rights and powers of slave-owners cannot be exercised therein, the effect of this provision in the Constitution and laws of the United States is to limit and restrain this general rule, so far as it is done by the plain meaning and obvious intent and import of the language used and no further. The Constitution and law manifestly refer to the case of a slave escaping from a State where he owes service or labor into another State or Territory. He is termed a fugitive from labor; the proof to be made is that he owed service or labor, under the laws of the State or Territory *from which he fled*, and the authority given is to remove such fugitive to the State *from which he fled*. This language can, by no reasonable construction, be applied to the case of a slave who has not fled from the State, but who has been brought into this State by his master. The same conclusion will result from a consideration of the well known circumstances under which the Constitution was formed." And on page 221, the judge says, that, it is to be presumed that the parties to the constitution "selected terms intended to express their exact and their whole meaning; and it would be a departure from the purpose and spirit of the compact to put any other construction upon it than that to be derived from the plain and natural import of the language used."

The same doctrine was reaffirmed by the same court, in *Commonwealth v. Taylor* (1841), 4 Month. L. Rep. 274, where the court remanded the person whose right to freedom was in

question, as a minor, to the custody of a guardian appointed by the court.

There are many other cases which might be cited as supporting the same interpretation. Among these the recent cases, *Anderson v. Poindexter*, 6 Ohio, 622, and *The People v. Lemmon*, in 20 N. Y. Rep. 562, may be particularly referred to, since they contain very full citations of the older cases.

§ 721. From the very nature of the whole provision, the persons who are immediately affected by it are spoken of as passing from the jurisdiction of a State, by whose laws another person *holds* them to service or labor, into some other State, the law of which last may or may not be similar to that of the first. The word *escaping* has a distinctive meaning in reference to that service or labor which is mentioned in this provision, and implies that the person held to service, by his own volition, or rather without the knowledge and consent of the master or owner, passes beyond the control of the local law which creates the relation between them. It is only persons who have thus escaped from the territorial jurisdiction of the law of the State of their domicile, by which they are held to service or labor, who, under this provision, would be excepted in another State from the ordinary effect of a change of jurisdiction. In a State wherein the local law does not sanction such holding of a person to service or labor as is here referred to, there cannot, in fact, be any *escape* from the holding of a master, as there is there no law making that service *due*. If, therefore, the servant or slave enters such a State in any other manner than by escaping *into* that State *from* the State which upholds his servitude, he is subject only to the law of that particular State—the law (internal and international) resting upon the several will of the local power or sovereignty. Slaves entering with the consent of their owners into another State cannot be “delivered up” to any party *under this provision*. Whether their former condition is to be maintained within such State, or not, will depend upon private international law as therein received or allowed by the supreme source of the local law, that international rule which, when ascertained, has the authority of positive law over all persons within the jurisdic-



tion of the State, but which is not law in the strict sense, in reference to the political persons or people who, by public law, constitute the political State, or are invested with the sovereign powers belonging to one of the States of the United States, or "the People" thereof, and which, in its extent and authority, is identified with the several or local law of the State.<sup>1</sup>

§ 722. The question of the extent of this provision arises in connection with a variety of modifying circumstances.

In *State v. Hoppess* (1845), 2 Western Law Journal, 279, it was held that a person held to service or labor under the laws of Arkansas, escaping from a boat on the Ohio River, within low-water mark on the Ohio side, and fastened to the shore, on which boat his master is returning to his residence in Virginia, is within the meaning of the provision and acts of Congress. Judge Read held that it was a consequence of the Virginia deed of cession and her "compact for setting off Kentucky as a State," by which she declared "that her jurisdiction over the river should be common or concurrent to the States bordering upon it;" that "a master navigating the river, whilst on the water, is within the jurisdiction of Virginia or Kentucky for the purpose of retaining the right to his slave."

§ 723. In *Commonwealth v. Halloway*, 2 Serg. & Rawle, 305, in which "a habeas corpus having been directed to the keeper of the prison of the city and county of Philadelphia, commanding him to produce the body of *Eliza*, a negro child, together with the cause of her detention, he returned that he held her by virtue of a warrant of commitment issued by Samuel Badger, Esq., an associate judge of the Court of Common Pleas, who had committed her 'as being the daughter of Mary, a negro woman, the slave of James Corse, of Maryland, and as such the slave of the said James.' On the hearing, it ap-

<sup>1</sup> In any of the cases of claim stated *ante*, p. 358, the only presumption of law that can be made must be given by the law of the forum of jurisdiction. In the non-slaveholding State the presumption is in favor of liberty; and on the general rule of interpretation, the provision should be interpreted strictly. *Ante*, § 702.

<sup>2</sup> See the remark on a concurrent jurisdiction under such circumstances, recognized in international law; *ante*, Vol. I. p. 353, n. 2. But could an owner from some State other than Virginia or Kentucky have, under these circumstances, elected to be under the jurisdiction of Virginia or Kentucky?



peared that the mother had absconded from her master and come to Philadelphia, where, after she had resided for about two years, the child was born. She was after apprehended in Philadelphia as the slave of Corse, and delivered to him as such by a magistrate, after an examination of the case."

Tilghman, Ch. J., said (p. 307):—"The case of the absconding slave is provided for without mention of the issue." Yates, J. (p. 308):—"It cannot be supposed for a moment that the child in question, who was not in existence when her mother ran away, had escaped or was a fugitive. Her case, therefore, is not embraced either by the Constitution of the United States or by the act of Congress." This case was followed in *Commonwealth v. Alberti*, 2 Parsons' Select Cases, 495.

In *Prigg v. The Commonwealth of Pennsylvania*, 16 Peters, 557, the plaintiff had seized and removed a negro woman and her children, one of whom was born in Pennsylvania more than one year after the mother had escaped from Maryland. The Supreme Court of the United States affirmed the right of the plaintiff to remove these persons, without noticing this circumstance.<sup>1</sup>

In *Fields v. Walker* (1853), 23 Alabama, 155, it was held that the children born in Alabama of a slave woman who had escaped from another State could not be claimed and delivered up with her under this provision and the act of Congress, though possession might be taken under the State law; and *ib.* 166, *Union Bank v. Benham*, *ib.* 142, is cited as sustaining the same doctrine.

It has been held, by authorities which will hereinafter be fully considered, that the effect of this provision is to continue, in the State into which he or she may have fled, the status of the slave and the rights of the owner, as they were known to the law of the State in which the escaped slave had been

<sup>1</sup> The question appears to have been raised, whether the issue was born free under the State law, abolishing slavery, of March 1, 1780, and, in view of the exception in the 11th section of that act, Tilghman, J., said:—"It appears to me, therefore, that under the act of assembly this child is entitled to freedom. I desire it, however, to be understood, that it is not intended, to intimate any opinion on \* \* \* nor on the case of a child with which a slave absconding from another State should be pregnant at the time when she came into this State." Compare comment on this case in 1 Cobb on Slavery, p. 79.

<sup>2</sup> De minimis non curat lex—is Judge Sutliff's suggestion; 9 Ohio, 263.

held to service or labor. Assuming the correctness of this view, it might well be urged that the law of the condition of the issue was incidental to that of the condition of the mother, and that, as increase of the property, the issue belonged to the owner of the slave mother, by the law of the State from which she escaped, extended under this provision.

It will hereinafter be argued that the provision will not bear this construction; that the integral status of the slave is not so continued; that the right of the master is, solely, to have delivery made on a claim, and that the only correlative obligation of the escaped slave, under this provision, is to return to the State from which he or she escaped. In this view there is nothing in this clause to determine the condition of the issue, and it is therefore to be ascertained by that law which in its authority and territorial extent is local or *State* law.

§ 724. In *Glen v. Hodges* (1812), 9 Johns. 67, after the slave had been taken by the plaintiff, the defendant took out an attachment against the slave for debt, on which he was arrested and taken out of the plaintiff's possession. The court said the question is, "Whether the defendant is not responsible in trespass for rescuing the slave, though he did it under the form and color of an attachment for a debt alleged to have been contracted with him by the slave. The negro, being a slave, was incapable of contracting so as to impair the right of his master to reclaim him. A contrary doctrine would be intolerable, so far as it respects the security of the owner's right, and would go to defeat the provision altogether. The defendant, therefore, contracted with the negro and sued out the attachment at his peril. It was a fraud upon the master's right. The fact being established that the negro was a fugitive slave, the attachment was no justification to the party who caused it to be sued out. This must have been so adjudged, if the point had been in Vermont, because the entering into a contract with such slave and the endeavor to hold him under that contract contravened the law of the United States, which protects the master or owner of fugitive slaves in all his rights as such owner. If the slave had committed any public offence in Vermont, and had been detained under the authority of the gov-



ernment of that State, the case would have been different, and the right of the master must have yielded to a paramount right. But the interference of any private individual by suing out process or otherwise under the pretense of a debt contracted by the negro was an illegal act and void."

The above *dictum*, in respect to fugitives who should infringe the penal law, is confirmed in *The Commonwealth, ex rel. Johnson, a negro, v. Holloway* (1817), 3 Serg. & Rawle, 4, where it was unanimously held that a runaway slave who is charged with fornication and bastardy in the State cannot be delivered over to his master unless security be first given for the maintenance of the child.<sup>1</sup>

§ 725. The persons who may be claimed and delivered up are described as owing service or labor in a *State* under the laws thereof, and as escaping into another *State*. From the terms of the two Acts passed on this subject, Congress must be supposed to have construed the word, as here used, to include a Territory of the United States and the District of Columbia. There are no recorded judicial opinions on the meaning of the word *State* in this provision.

It has been seen that the word *State*, in the clause defining the extent of the judicial power of the United States, has been limited by the courts to the organized States of the Union, excluding the Territories and the District of Columbia.<sup>2</sup> The greater number of opinions seems to be in favor of restricting equally the meaning of the word in the first section of this Article.<sup>3</sup> It would be difficult to say why the reasoning which has supported these opinions should not equally determine the meaning of the word in the several clauses of the second section of this Article. So far, therefore, as there is any judicial authority as to the meaning of the word here, it is rather in favor of the restricted sense.

<sup>1</sup> It does not appear which commitment was the earliest. In *Sims'* case, he being in the custody of the U. S. Marshal, under an order or warrant of a U. S. Commissioner acting under the law of 1850, and another issuing for a violation of the criminal law of the United States, process was issued by State authority against him for violation of the State law. Opinions of counsel taken on that occasion supported the custody of the United States as against the State; on the ground that priority of possession should decide. IV. Month. L. Rep. 155. The opinion of C. B. Goodrich, Esq., *ib.* 335, maintains the custody of the United States under the fugitive-slave law, if prior in time, against the penal law of the State.

<sup>2</sup> *Ante*, Vol. I. p. 433.

<sup>3</sup> *Ante*, § 624.



It seems indisputable that the word *State*, in the Constitution, is employed to designate a political community organized in some manner peculiar to that country and nation in and by which that Constitution is recognized as the highest public law, and not in that general sense in which the word *state* is used by writers on general public law and political ethics. Following the pre-existing and continued use of the term in expositions of the public law of the United States, it would seem that the word could not be *interpreted* in the Constitution as meaning anything else than an organized State of the United States, "a member of the American compact," or "a member of the Union," such as is spoken of in those clauses of the Constitution which prescribe the organization of the Senate and House of Representatives, and the mode of electing a President of the United States.<sup>1</sup>

But if a given text may be construed, by reference to the general purpose of the utterer, as ascertained from the mere interpretation of the terms used and other elements furnished by the context, so as to give to those terms a wider or narrower meaning than they could have by interpretation alone,<sup>2</sup> there may be sufficient reasons for not thus limiting the extent of the term *State* in these clauses of the Fourth Article.

It is not a received principle, that a word occurring in different places in one instrument is always to be understood in the same sense.<sup>3</sup> In the clauses prescribing the organization

<sup>1</sup> Judge Law, in *Seton v. Hanham*, R. M. Charlton, 374.

<sup>2</sup> Ch. Justice Marshall, in *Hepburn v. Elzey*, 2 Cranch, 452.

<sup>3</sup> In the case last cited, Marshall, referring to these clauses, says:—"These clauses show that the word *State* is used in the Constitution as designating a member of the Union, and excludes from the term the signification attached to it by most writers on the law of nations. When the same term which has been used plainly in this limited sense in the articles respecting the legislative and executive departments is also employed in that which respects the judicial power, it must be understood as retaining the sense originally given to it."

<sup>4</sup> Lieber's *Hermeneutics*, 56. "Construction is likewise our guide, if we are bound to act in cases which have not been foreseen by the framers of those rules by which we are nevertheless obliged, for some binding reason, faithfully to regulate, as well as we can, our actions respecting the unforeseen case; for instance, when we have to act, in politics, bound by a Constitution in a case which presents features entirely new and unforeseen."

"Construction is the drawing of conclusions respecting subjects that lie beyond the direct expression of the text—from elements known from and given in the text—conclusions which are in the spirit, though not within the letter, of the text."

<sup>5</sup> *Ante*, p. 330, note. Much may depend on the character of the instrument.

of the national Government, and in the last paragraph of this Article, relating to the admission of new States into the Union, the rule enacted is one of public law; it determines the modal existence of the integral people of the United States in their possession of those national powers which, by the Constitution, are "granted" to the Government of the United States.<sup>1</sup> But the clauses which are here considered define and guarantee rights which are to be claimed by private persons as against other private persons, and, even if they are public law by conferring power on Congress or by limiting the powers of the several States, the protection of private rights by the enforcement of private obligations under a *quasi*-international private law is the end specifically in view.<sup>2</sup>

As in each of the organized States of the Union there is a local municipal law emanating from the "reserved" powers held by the State or the several people thereof, so in the District of Columbia and in the several Territories of the United States there is a local municipal law emanating from powers of like nature with those "reserved" powers; powers which, though not held in reservation by a local political people of such District and Territories, but held by the Government of the United States, are like the "reserved" powers of a State, distinct from the powers "granted" in the Constitution to the national Government to be exercised in all parts of the dominion of the people of the United States.<sup>3</sup> If inhabitants of the organized States may be citizens of such State without reference to the possession of sovereignty by the corporate people of that State, so inhabitants of the District or Territories may be citizens thereof. The public acts, records, and judicial proceedings of the District and Territories are as fitly objects of recognition in international private law as are those of the organized States. Their penal laws have as high a sanction as have those of the States, and free and bond con-

In a statute, directed to some well-known end, the rule may be different. See Lord Denman, C. J., in 6 Ad. & Ellis, 68, 69.

<sup>1</sup> *Ante* Vol. I., p. 407, note 3.

<sup>2</sup> That these provisions have this character, as distinguished from being public international law or treaty stipulations, will be argued in Ch. XXVII.

<sup>3</sup> *Ante*, §§ 376, 397.



ditions may as lawfully exist in them as in districts under the political dominion of an organized member of the national Union. To all the intents and purposes contemplated in these clauses, they are whatever the organized States are. In the provisions of the Constitution which are in the nature of a bill of rights, the inhabitants of the District and of the Territories have a guarantee of their civil liberties similar to those enjoyed by the inhabitants of the States under the same provisions, and under their several State Constitutions. The Constitution also provides that the powers from which the local laws of existing Territories proceed shall hereafter become the "reserved" powers of the people of new States organized in those Territories. The franchises maintained by these provisions are enjoyed in private relations under a law having *quasi*-international extent. The history of public law in America exhibits a distinction, in respect to the enjoyment of political rights, between the inhabitants of an organized colony or State and the inhabitants of territory not organized under a local autonomic authority recognized by the instruments of imperial or national government. But the history of American private law shows no corresponding distinction, between persons so discriminated, in respect to franchises not political, least of all in respect to such as have had *quasi*-international extent. The construction which comprehends the District and the Territories within the extent of the word *State* in these clauses is in harmony with the spirit of American private law as exhibited in the existing Constitution, the Ordinance of 1787, the Articles of Confederation, and the history of colonial law.<sup>1</sup>

<sup>1</sup> The argument applies also in the interpretation of the same word when employed in the third Article (see *ante*, Vol. I., p. 434). It may be argued that that provision contains a grant of power to the national Government, thereby limiting the reserved powers of the States; that it therefore is to be construed strictly. But it is also a franchise to the private citizen to have a choice of tribunals. See *Newton v. Turpin*, *ante*, p. 75, note.

It should be remembered that, when the Constitution was adopted, the only territory of the United States was that lying east of the Mississippi, which had been ceded by the several States (*ante*, p. 1, note 2), and that—"the farther removed the time of the origin of any text may be from us, the more we are at times authorized or bound, as the case may be, to resort to extensive construction. For times and the relations of things change, and if the laws, &c., do not change accordingly, to effect which is rarely in the power of the construer, they must be

<sup>2</sup> according to the altered circumstances, if they shall continue to mean "remain beneficial." Lieber's *Herm.* 134. In *Rev. Code of North*



§ 726. In *Vaughan v. Williams* (1845), 3 McLean, 530; S. C., 3 Western L. J. 65, the action was under the State law, for rescuing, in Indiana, from the possession of the plaintiff, a citizen of Missouri, certain negroes, who, before he could lay any claim to them, had been brought voluntarily, by their owner, into Illinois, and there resided with him for six months. On the judge's charge, the verdict was for the defendant, who had also demurred on the ground that the constitutional provision does not apply "where the claim is made by a citizen of a new State not within the territorial limits of the Union at the adoption of the Constitution, and that a citizen of Indiana is not bound by such provisions; that the sixth article of the Ordinance of 1787, which remains in full force in Indiana, requires a fugitive from labor to be delivered up only when 'claimed in any one of the original States.'" The demurrer was overruled by Judge McLean.

In *Jones v. Van Zandt* (1842), 2 McLean, 611, where the action was in the U. S. Circuit, for the penalty under the act of 1793, for "harboring" a fugitive, the court held that the act is not affected by the sixth article of the Ordinance of 1787,<sup>1</sup> which, it was urged in this case, "is paramount to the act of Congress, and imposes no obligation on this State [Ohio] to deliver up a fugitive from labor, except when claimed by a citizen of one of the original States."

This case having been carried up to the Supreme Court of the United States, it was said by Woodbury, J., delivering the opinion of the Court, 5 Howard (1846), 230:—The last question on which a division is certified, relates to the Ordinance of 1787, and the supposed repugnancy to it of the act of Congress of 1793. "The Ordinance prohibited the existence of slavery in the territory northwest of the River Ohio, among only its own people. Similar prohibitions have from time to time been introduced into many of the old States. But this circumstance does not affect the domestic institution of slavery, as other States may choose to allow it among their people, nor

Carolina, c. 108, § 2, it is declared that the words *State* and *United States* in that Code shall be "construed" to include the District of Columbia and the Territories.

<sup>1</sup> *Ante*, p. 113.

impair their rights of property under it, when their slaves happen to escape to other States. These other States, whether northwest of the River Ohio, or on the eastern side of the Alleghanies, if out of the Union, would not be bound to surrender fugitives, even for crimes, it being, as before remarked, an act of comity, or imperfect obligation. *Holmes v. Dennison et al.*, 14 Pet. 540. But while within the Union, and under the obligations of the Constitution and the laws of the Union, requiring that this kind of property in citizens of other States—the right to ‘service or labor’—be not discharged or destroyed, they must not interfere to impair or destroy it, but, if one so held to labor escape into their limits, should allow him to be retaken and returned to the place where he belongs. In all this there is no repugnance to the Ordinance. Wherever that existed, States still maintain their own laws, as well as the Ordinance, by not allowing slavery to exist among their own citizens. 4 Martin, 385. But, in relation to inhabitants of other States, if they escape into the limits of States within the Ordinance, and if the Constitution allow them, when fugitives from labor, to be reclaimed, this does not interfere with their own laws as to their own people, nor do acts of Congress interfere with them, which are rightfully passed to carry these constitutional rights into effect there, as fully as in other portions of the Union.”

See also, Read, J., in *State v. Hoppess*, 2 Western L. J. 289, and Peck, J., that Kentucky is in the same position as Virginia in respect to this provision, in *Ex parte Bushnell*, 9 Ohio, 215.



## CHAPTER XXVI.

DOMESTIC INTERNATIONAL LAW OF THE UNITED STATES. THE SUBJECT CONTINUED. COMPARISON OF THE AUTHORITIES ON THE CONSTRUCTION OF THE PROVISIONS FOR DELIVERING UP FUGITIVES FROM JUSTICE AND FROM LABOR.

§ 727. According to the method proposed at the commencement of the preceding chapter, the question is now to be taken up—

By what means are these provisions to be made operative on private persons?

As has already been said, this question involves an inquiry into the construction of these provisions.<sup>1</sup>

This chapter will be devoted to the examination of the authorities on the question of the true construction of these clauses, and on the incidental inquiry into the basis of whatever power Congress may have to carry them into effect.

§ 728. In discriminating the true bearing of the statutes of Congress and other authorities on these inquiries, it will be necessary to bear in mind the conclusions which any one of the constructions which may be given to them will involve. The four constructions already indicated as possible<sup>2</sup> may here be properly repeated, and the conclusions to be derived from them, in their special application to these clauses, as to the legislative power of Congress, stated, before proceeding to the citation of the authorities.

1. According to the first construction, these clauses are of the nature of an international compact between the States as distinct political personalities, and resemble, in effect, those principles which, when regarded as an international rule of action for independent states, are *law* in the imperfect sense only, and affect private persons within the limits of such states

<sup>1</sup> *Ante*, p. 379.

<sup>2</sup> *Ante*, § 602.



only by the will and consent of the local sovereignty. Under this view, consequently, each State in which a fugitive from justice or from labor may be found is severally to be looked upon as the person or party bound by the rule contained in either clause, and, at the same time, as the political source from which it is to derive its coercive effect upon private persons within the limits of such State. Neither clause can be made thus operative except by the State in which the fugitive is found, acting by the ordinary instrumentalities of its organized Government; so that if the execution of either provision is refused or neglected by such State, or its instrument, the State Government, there is no relief for the claimant of the fugitive from labor, in the one case, or for the State demanding the fugitive criminal, in the other; though the just interpretation of the Constitution may require the delivery. The State refusing or neglecting is to be regarded as faithless to an obligation assumed by it in a compact with the other States; but, being sovereign in reference to those relations of private persons within its territory which are affected by these provisions, the claim or demand cannot be enforced, and has no *legal* validity.

2. According to the second construction, the States are still, as in the first, regarded as the immediate subjects of the rule of action contained in these clauses, and the duties which they create are still taken to be the international obligations of the States, severally, towards another State, or private persons, claiming rights under them. Under this view, the duties which are by these clauses created, for the State in which the fugitive from justice or from labor may be found, differ in no respect from those arising under the first construction, and the difference in the effect, relatively to the right of the demandant State or of the private claimants, arises from the inference or conclusion drawn from the character attributed to these clauses, viz.: that they are laws in the strict sense acting on the States as its subjects. From which it is concluded that there must somewhere be a political person distinct from the States—the subjects of the law—having power to make it effectual; that this person can be no other than the organized

Government of the United States, the only known administrative instrument of the will of the authors of the rule; and that Congress may legislate to carry into effect the power so vested in that Government.

3. According to the third construction, these provisions act directly on some certain public and private persons, viz.: the Executive of a State and the person to whom the service of a fugitive bondman is due, on the one hand, and the national Government, on the other, creating a relation in which such Executive, or such private person, possesses a right correlative to an obligation of the national Government, and either giving rise to a class of "cases arising under the Constitution," or to "controversies to which the United States is a party," coming within the extent of the judicial power of the United States; or giving occasion for claims against the United States, or against the national Government, for the satisfaction of which Congress may provide in any manner consistent with other parts of the Constitution.

4. According to the fourth construction, while these clauses are taken, as in the preceding view, to be *law* in the strict and proper sense, private persons only are its immediate subjects, and the rights given and obligations imposed by it are the constituent parts either of relations between private persons or relations between private persons owing an obligation and a State appearing beyond its own jurisdiction as the person claiming the correlative right. Under this view these clauses have the character of private international law, in applying to persons distinguished by their domicile, or by previous subjection to the law of another jurisdiction, but are binding on private persons, within the limits of the United States, as a national municipal (internal) law, without reference to the limits of the States; except as they are the territorial jurisdictions by whose existence the escape of a fugitive, from one system of punitive laws, or from service or labor under a local law, into another forum, is rendered possible. Under this view the right of the claimant owner, or demandant State, and the obligation of the fugitive from labor or from justice exist under that law which has been before de-



scribed as that part of the domestic international private law of the United States which, in authority, is identified with the national municipal private law, and therefore called *quasi-international*. As a consequence of this construction it will follow, that the demand or claim of such rights and the denial of such obligations will create cases such as are mentioned in the third Article as within the judicial power of the United States, and such as are within the concurrent judicial power of the States, because the subject matter is within the original jurisdiction of the State.

§ 729. The authorities on the construction of the provision for the demand and delivery of fugitives from justice, and, in connection, on the power of Congress to legislate in respect to its execution, are first to be considered.

The earliest authority<sup>1</sup> is the action of Congress itself.

If Congress, in legislating, had proposed to maintain the right of the demandant Executive, or State, as correlative to a duty of the State in which the fugitive is found (according to the second construction), it would seem that the State owing the duty would have been required or allowed to appear, on hearing of the demand, as a party interested. If the Governor upon whom the demand is to be made derives power in the matter from the Act of Congress, as commonly supposed, it is

<sup>1</sup> On the marshaling of the authorities, compare *ante*, pp. 244, 245. In the first controversy which arose under this provision, two years before the act of Congress (*ante*, p. 386), the public officers concerned differed on the question whether legislation was necessary to give effect to the provision. But none held that the demand and delivery would, under the Constitution alone, be a case within the judicial power. Randolph, U. S. Atty. Gen., who held that no law, State or federal, was necessary, supposed that the Governor, acting for the State, in fulfilling its duty as a political person under the compact, would have power to order the extradition. He argued, "The Executive of Virginia contend that her own Constitution and laws and those of the United States being silent as to the manner and particulars of arrest and delivery, they cannot, as yet, move in the affair. To deliver up is an acknowledged federal duty, and the law couples with it the right of using all incidental means in order to discharge it. I will not inquire how far these incidental means, if opposed to the Constitution and laws of Virginia, ought, notwithstanding, to be exercised, because McGuire and his associates may be surrendered without calling upon any public officer of that State. Private persons may be employed and clothed with a special authority. The Attorney General [of Va.] agrees that a law of the United States might so ordain: and wherein does a genuine distinction consist between a power deducible from the Constitution as incidental to a duty imposed by that Constitution and a power given by Congress as auxiliary to the execution of such a duty?" *Am. State Papers*, Misc. I., 41.



power to enforce the rule against the State of which he is the Executive. He can hardly be supposed to represent the State at the same time in a position essentially antagonistic to that which he holds under the act of Congress.

If Congress had assumed to legislate on the idea (comprehended under the third construction) that, by the demand of a fugitive from justice, a case arises under the Constitution, in which the demandant State, or executive officer, is one party, and the national Government the other, or a controversy to which the United States is a party, it would seem that provision would have been made for the appearance, in such case or controversy, of the national Government. Since it contains no such provision, the act of 1793 is an authority against this adaptation of the third construction.

If, by its actual legislation, Congress has directed that the delivery of a fugitive from justice may be carried out by persons who cannot, under the Constitution, hold the judicial power of the United States, it must be supposed that such legislation was not based on the idea that in such delivery the judicial power of the United States will be applied in a case arising under this provision, operating as law in the strict sense, according to the third or the fourth construction.<sup>1</sup>

§ 730. The question, whether the Governors of the States, when acting in conformity with the law of Congress, have exercised power politically derived from the United States, will be hereinafter considered, when the constitutionality of that law, in its details, is examined. But if, in any cases, such action of a State Governor has been judicially held to have

<sup>1</sup> The House of Representatives, March 1, 1861, by a vote of 47 to 126, rejected a bill entitled *An Act for the amendment of the Act for the rendition of fugitives from justice*, which provided "that every person charged by indictment or other satisfactory evidence, in any State, with treason, felony, or other crime, committed within the jurisdiction of such State, who shall flee or shall have fled from justice, and be found in another State, shall, on the demand of the executive authority of the State from which he fled upon the judge of the United States of the District in which he may be found, be arrested and brought before such judge, who, on being satisfied that he is the person charged, and that he was within the jurisdiction of such State at the time such crime was committed, of which such charge shall be *prima facie* evidence, shall deliver him up to be removed to the State having jurisdiction of the crime; and if any question of law shall arise during such examination, it may be taken, on exception, by writ of error, to the Circuit Court." I am not informed as to the action of the Senate on this bill.

carried out the delivery required by the provision, and has also been justified as power derived from the United States, such cases must be taken as an authority against the fourth construction, and against that adaptation of the third which supposes the extension of the judicial power over a case in which the national Government is a party. They are a judicial repudiation of the idea that the Act of Congress is constitutional by its carrying into effect power belonging to the judiciary department of the United States.

There are many cases wherein a custody under the warrant of the State Executive has been justified under this provision and the Act of Congress. But the political source of the authority therein exercised by such Executive has not been particularly discriminated in the judicial opinions, and no attempt has been made to show the basis of the power attributed to Congress. In most of these opinions, there is an intimation that the State Executive would have no authority in the absence of the act of Congress,<sup>1</sup> and the language favors the doctrine of an *implied* power in the national Government to secure the right guaranteed to the State demandant, as correlative to a duty on the part of the State in which the fugitive is found; according to the second construction above stated.

It will be seen hereinafter that, in some opinions, wherein either the second or the third construction of the provision concerning fugitives from labor is made the basis of the legislation of Congress in respect to such persons, the power to legislate in respect to fugitives from justice is said to rest on the same foundation. On a full examination of Judge Story's opinion in *Prigg's* case, it may appear that he regarded this provision as creating cases, within the judicial power, in which the demandant State or Executive is one party, and the national Government the other party; thus supporting the third construction.<sup>2</sup> Yet in the same case, 16 Peters, 620, Story

<sup>1</sup> See particularly U. S. Dist. Judge Pope's opinion in 3 McLean C. C. R. 129, 131. Judge McLean, in *Prigg's* case, 16 Peters, 664, would seem to derive the Governor's power from the State. See these opinions stated and compared, *post*, in Ch. XXVIII.

<sup>2</sup> Mr. George T. Curtis, U. S. Commissioner, held, in *Sims' case* (Monthly Law Reporter, Vol. IV., N. S., p. 6), that the claim of a master for a fugitive slave was, under the constitutional provision, a case within the judicial power of the United



held that the right and duty created by this provision are not capable of enforcement without legislation. He said:—"Yet the right and duty are dependent as to their mode of execution solely on the act of Congress, and but for that they would remain a nominal right and a passive duty, the execution of which, being entrusted to no one in particular, all persons might be at liberty to disregard." According to this view, this provision does not act on any persons *as law*, until Congress shall have prescribed the means by which it should be carried into effect; and there is, under the provision alone, no such right and obligation as would call for the action of the judicial power according to the fourth, and one adaptation of the third, construction.<sup>1</sup>

§ 731. The opinion delivered by Chief Justice Taney in pronouncing the judgment of the Supreme Court of the United States, in the recent case of *Kentucky v. Dennison*, seems to be the only judicial authority on the question of the construction of this provision. The facts of the case have already been described. After the portion of the opinion which has been cited on pages 381-385, the Chief Justice proceeds to say:—

"The clause in question, like the clause in the confederation, authorizes the demand to be made by the executive authority of the State where the crime was committed, but does not in so many words specify the officer of the State upon whom the demand is to be made, and whose duty it is to have the fugitive delivered, and removed to the State having jurisdiction of the crime. But under the confederation, it is plain that the demand was to be made on the Governor or executive

States, and considered this as the basis of the legislation of Congress in respect to that provision. On page 7 of the report he observes:—"The rendition of fugitives from service, under the Constitution, is an act analogous to the rendition of fugitives from justice, and the two cases, so far as the powers and duties of the general Government are concerned, are of the same general nature, and may appropriately be provided for by the same general means." See *post*, where the case is in this chapter given. It may hereinafter appear that Mr. Curtis in this case has followed very closely Judge Story's opinion in *Prigg's* case.

<sup>1</sup> In many cases it is held that the courts have power to issue process to arrest a person as fugitive from justice, even when no demand has been made on the Governor, according to the act of Congress. See *Fetter's* case, 3 *Zabr.* 311. This seems to support the view that the Constitution operates independently of the statute. But it is questionable whether the arrest in such cases has not been justified on common law principles.



authority of the State, and could be made on no other department or officer; for the confederation was only a league of separate sovereignties, in which each State, within its own limits, held and exercised all the powers of sovereignty; and the confederation had no officer, either executive, judicial, or ministerial, through whom it could exercise an authority within the limits of a State. In the present Constitution, however, these powers, to a limited extent, have been conferred on the General Government within the Territories of the several States. But the part of the clause in relation to the mode of demanding and surrendering the fugitive is (with the exception of an unimportant word or two) a literal copy of the Article of the Confederation, and it is plain that the mode of the demand and the official authority by and to whom it was addressed, under the confederation, must have been in the minds of the members of the convention when this Article was introduced; and that in adopting the same words they manifestly intended to sanction the mode of proceeding practiced under the confederation; that is, of demanding the fugitive from the executive authority, and making it his duty to cause him to be delivered up.

“Looking, therefore, to the words of the Constitution—to the obvious policy and necessity of this provision to preserve harmony between States, and order and law within their respective borders, and to its early adoption by the colonies and then by the confederated States, whose mutual interest it was to give each other aid and support whenever it was needed—the conclusion is irresistible, that this compact, engrafted in the Constitution, included, and was intended to include, every offence made punishable by the law of the State in which it was committed, and that it gives the right to the executive authority of the State to demand the fugitive from the executive authority of the State in which he is found; that the right given to “demand” implies that it is an absolute right, and it follows that there must be a correlative obligation to deliver, without any reference to the character of the crime charged, or to the policy or laws of the State to which the fugitive has fled.

"This is evidently the construction put upon this Article, in the act of Congress of 1793, under which the proceedings now before us are instituted. It is, therefore, the construction put upon it almost coterminously with the commencement of the government itself, and when Washington was still at its head, and many of those who had assisted in framing it were members of the Congress which enacted the law.

"The Constitution having established the right on one part and the obligation on the other, it became necessary to provide by law the mode of carrying it into execution. The Governor of the State could not, upon a charge made before him, demand the fugitive; for, according to the principles upon which all of our institutions are founded, the executive department can act only in subordination to the judicial department, where rights of person or property are concerned, and its duty in those cases consists only in aiding to support the judicial process and enforcing its authority, when its interposition for that purpose becomes necessary, and is called for by the judicial department. The executive authority of the State, therefore, was not authorized by this Article to make the demand unless the party was charged in the regular course of judicial proceedings. And it was equally necessary that the executive authority of the State upon which the demand was made, when called on to render his aid, should be satisfied by competent proof that the party was so charged.

"This proceeding, when duly authenticated, is his authority for arresting the offender.

"This duty of providing by law the regulations necessary to carry this compact into execution, from the nature of the duty and the object in view, was manifestly devolved upon Congress; for if it was left to the States, each State might require different proof to authenticate the judicial proceeding upon which the demand was founded; and as the duty of the Governor of the State where the fugitive was found is in such cases merely ministerial, without the right to exercise either executive or judicial discretion, he could not lawfully issue a warrant to arrest an individual without a law of the State or of Congress to authorize it. These difficulties presented them-



selves as early as 1791, in a demand made by the Governor of Pennsylvania upon the Governor of Virginia, and both of them admitted the propriety of bringing the subject before the President, who immediately submitted the matter to the consideration of Congress. And this led to the act of 1793, of which we are now speaking. All difficulty as to the mode of authenticating the judicial proceeding was removed by the Article in the Constitution, which declares, 'that full faith and credit shall be given in each State to the public acts, records, and judicial proceedings of every other State; and the Congress may, by general laws, prescribe the manner in which acts, records, and proceedings shall be proved, and the effect thereof.' And without doubt the provision of which we are now speaking—that is, for the delivery of a fugitive, which requires official communications between States, and the authentication of official documents—was in the minds of the framers of the Constitution, and had its influence in inducing them to give this power to Congress. And acting upon this authority, and the clause of the Constitution which is the subject of the present controversy, Congress passed the act of 1793, February 12th, which, as far as relates to this subject, is in the following words:"

Here the Chief Justice recites the first and second sections of the act,<sup>1</sup> and then proceeds:—

"It will be observed, that the judicial acts which are necessary to authorize the demand are plainly specified in the act of Congress; and the certificate of the executive authority is made conclusive as to their verity when presented to the Executive of the State where the fugitive is found. He has no right to look behind them, or to question them, or to look into the character of the crime specified in this judicial proceeding. The duty which he is to perform is, as we have already said, merely ministerial—that is, to cause the party to be arrested, and delivered to the agent or authority of the State where the crime was committed. It is said in the argument, that the executive officer upon whom this demand is made must have

<sup>1</sup> See *post* in the commencement of Ch. XXVII.



a discretionary executive power, because he must inquire and decide who is the person demanded. But this certainly is not a discretionary duty upon which he is to exercise any judgment, but is a mere ministerial duty—that is, to do the act required to be done by him, and such as every Marshal and Sheriff must perform when process, either criminal or civil, is placed in his hands to be served on the person named in it. And it never has been supposed that this duty involved any discretionary power, or made him anything more than a mere ministerial officer; and such is the position and character of the Executive of the State under this law, when the demand is made upon him and the requisite evidence produced. The Governor has only to issue his warrant to an agent or officer to arrest the party named in the demand.”

§ 732. The portion of the opinion above cited bears more directly upon a question which will be hereinafter, in the twenty-eighth chapter, examined more particularly, viz.:—Whether the action of a Governor of a State, in making the delivery required by the law of Congress, involves the exercise of the judicial power of the United States? The portion of the opinion immediately after that above cited bears more particularly on the question of the construction of the provision. It is as follows:—

“The question which remains to be examined is a grave and important one. When the demand was made, the proofs required by the act of 1793, to support it, were exhibited to the Governor of Ohio, duly certified and authenticated; and the objection made to the validity of the indictment is altogether untenable. Kentucky has an undoubted right to regulate the forms of pleading and process in her own courts, in criminal as well as civil cases, and is not bound to conform to those of any other State. And whether the charge against Lago is legally and sufficiently laid in this indictment according to the laws of Kentucky, is a judicial question to be decided by the courts of the State, and not by the executive authority of the State of Ohio.

“The demand being thus made, the act of Congress declares, that ‘it shall be the duty of the executive authority of

the State' to cause the fugitive to be arrested and secured, and delivered to the agent of the demanding State. The words 'it shall be the duty,' in ordinary legislation, implies the assertion of the power to command, and to coerce obedience. But looking to the subject-matter of this law, and the relations which the United States and the several States bear to each other, the Court is of opinion, the words 'it shall be the duty' were not used as mandatory and compulsory, but as declaratory of the moral duty which this compact created, when Congress had provided the mode of carrying it into execution. The act does not provide any means to compel the execution of this duty, nor inflict any punishment for neglect or refusal on the part of the Executive of the State; nor is there any clause or provision in the Constitution which arms the government of the United States with this power. Indeed, such a power would place every State under the control and dominion of the general government, even in the administration of its internal concerns and reserved rights. And we think it clear, that the federal government, under the Constitution, has no power to impose on a State officer, as such, any duty whatever, and compel him to perform it; for if it possessed this power, it might overload the officer with duties, which would fill up all his time, and disable him from performing his obligation to the State, and might impose on him duties of a character incompatible with the rank and dignity to which he was elevated by the State.

"It is true that Congress may authorize a particular State officer to perform a particular duty; but if he declines to do so, it does not follow that he may be coerced, or punished for his refusal. And we are very far from supposing, that in using this word 'duty,' the statesmen who framed and passed the law, or the President who approved and signed it, intended to exercise a coercive power over State officers not warranted by the Constitution. But the General Government having in that law fulfilled the duty devolved upon it, by prescribing the proof and mode of authentication upon which the State authorities were bound to deliver the fugitive, the word 'duty' in the law points to the obligation on the State to carry it into execution.



"It is true, that in the early days of the Government, Congress relied with confidence upon the co-operation and support of the States, when exercising the legitimate powers of the General Government, and were accustomed to receive it upon principles of comity, and from a sense of mutual and common interest, where no such duty was imposed by the Constitution. And laws were passed authorizing State courts to entertain jurisdiction in proceedings by the United States, to recover penalties and forfeitures incurred by breaches of their revenue laws, and giving to the State courts the same authority with the District Court of the United States to enforce such penalties and forfeitures, and also the power to hear the allegations of parties, and to take proofs, if an application for a remission of the penalty or forfeiture should be made, according to the provisions of the acts of Congress. And these powers were for some years exercised by State tribunals, readily, and without objection, until in some of the States it was declined because it interfered with and retarded the performance of duties which properly belonged to them, as State courts; and in other States, doubts appear to have arisen as to the power of the courts, acting under the authority of the State, to inflict these penalties and forfeitures for offences against the General Government, unless especially authorized to do so by the State.

"And in these cases the co-operation of the States was a matter of comity which the several sovereignties extended to one another for their mutual benefit. It was not regarded by either party as an obligation imposed by the Constitution. And the acts of Congress conferring the jurisdiction, merely give the power to the State tribunals, but do not purport to regard it as a duty, and they leave it to the States to exercise it or not, as might best comport with their own sense of justice, and their own interest and convenience.

"But the language of the Act of 1793 is very different. It does not purport to give authority to the State executive to arrest and deliver the fugitive, but requires it to be done, and the language of the law implies an absolute obligation which the State authority is bound to perform. And when it speaks



of the duty of the Governor, it evidently points to the duty imposed by the Constitution in the clause we are now considering. The performance of this duty, however, is left to depend on the fidelity of the State executive to the compact entered into with the other States when it adopted the Constitution of the United States, and became a member of the Union. It was so left by the Constitution, and necessarily so left by the Act of 1793.

"And it would seem that when the Constitution was framed, and when this law was passed, it was confidently believed that a sense of justice and of mutual interest would insure a faithful execution of this constitutional provision by the executive of every State; for every State had an equal interest in the execution of a compact absolutely essential to their peace and well-being in their internal concerns, as well as members of the Union. Hence the use of the words ordinarily employed when an undoubted obligation is required to be performed, 'It shall be his duty.'

"But if the Governor of Ohio refuses to discharge this duty, there is no power delegated to the General Government, either through the judicial department or any other department, to use any coercive means to compel him.

"And upon this ground, the motion for the mandamus must be overruled."<sup>1</sup>

§ 733. Chancellor Kent is probably the only author who views the provision for the delivery of fugitives from justice

<sup>1</sup> In view of this opinion, it seems necessary to distinguish, besides the four already mentioned, another possible construction of this provision, according to which, the persons holding the executive authority of the State in which the crime was committed, and of that into which the criminal may have fled, are the subjects of the rule contained in the provision; the duty thereby created being a duty of the Governor of the State into which the fugitive from justice escaped, correlative to the right of the Governor of the State from which he fled, who makes the demand. The opinion carefully excludes the idea that an exercise of the judicial function is involved in the action of the Governor upon whom the demand is made. Hence, it must be inferred that the court would not base the power of Congress to legislate on the idea of carrying into execution a power vested in the judicial department of the Government, as under the third or the fourth construction before stated. If the court had held itself authorized to issue the *mandamus* prayed for, it might have been inferred that it would base the power of Congress to legislate upon the theory incidental to the second construction—that the rule contained is law in the strict sense, which must be enforced by some superior. But in view of this decision, it is difficult to see wherein the Act of Congress has produced any effect beyond that caused by the provision itself.

in that light which would base the legislative power of Congress, in this instance, upon the theory of carrying into execution the power already belonging to the judicial power of the United States. In Kent's Comm. Vol. II., p. 32, note, it is said :—" I am not aware that there has been any judicial opinion on this provision ; and as it stands, I should apprehend that on the demand being made, and the documents exhibited, no discretion remained with the Executive of the State to which the fugitive had fled, and that it was his duty to cause the fugitive to be arrested and surrendered (as has been done in one or more instances). I do not know of any power under the authority of the United States by which he could be coerced to perform the duty. Perhaps the Act of Congress may be considered as prescribing a duty, the performance of which cannot be enforced. The provision in the Constitution of the United States is not, however, to be regarded as a null and void provision, or resting on the mere will and pleasure of the State authorities. It is a substantive and essential grant of power by the people of the United States to the Government of the United States, and it partakes of a judicial character, and is fitly and constitutionally of judicial cognizance. The judicial power of the United States extends to all cases in law and equity arising under the Constitution, and the courts and judges of the United States within the State to which the fugitive has fled are the fittest tribunals to be clothed with the exercise of this power, so that the claimant might, on due application with the requisite proof, cause the fugitive to be arrested and removed or surrendered by the Marshal of the District, under regular judicial process by *habeas corpus*. To such a course of proceeding, and to such a source of power, I should rather apprehend the Act of Congress ought to have applied, and given facility and direction. Such a course of proceeding would be efficient, and more safe for the fugitive, and more consistent with the orderly and customary administration of justice. It concerns the common interest and intercourse among the several States, and is a branch of international jurisprudence."

It is not clear whether Kent adopted the fourth construc-



tion, under which a case arises in which the demandant State and the fugitive charged with crime are the parties, or that view, included under the third construction, according to which the demandant State and the national Government are parties in a case within the judicial power.<sup>1</sup>

§ 734. In pursuance of the analogy supposed to exist between these two provisions, as already indicated,<sup>2</sup> an independent inquiry into the true construction of this provision will be preceded by the citation of the authorities bearing on the construction of the provision for the delivery of fugitives from labor, and, in connection, on the power of Congress to legislate for the purpose of carrying the same into effect.

§ 735. There has never probably been an instance of an application to the Government of any State, or to the chief executive officer of any State, for the delivery of a fugitive from labor as a duty of the State under the first or the second construction.<sup>3</sup>

It seems to have been taken for granted that, if this provision creates a duty for the State, the Legislature must yet first authorize some person to make the delivery.

§ 736. In neither of the statutes passed by Congress is there any provision for the appearance of the national Government or of the State in which the fugitive from labor is found, as a party against whom a claim is made by the owner. This may be taken as legislative authority against the second and third construction.<sup>4</sup>

If by its actual legislation Congress has authorized the de-

<sup>1</sup> Story, in Comm. § 1811, has only a few words in justification of the fugitive-slave provision, and in § 1812 briefly vindicates the means provided by Congress in the Act of 1793, for carrying the two provisions into effect. These last will be cited *post* in Chs. XXVIII, XXIX. In the second edition, his editor, in § 1812 *a*, has given a summary of Judge Story's Opinion in *Prigg's case*, on the question of the powers of Congress, and of the States, to legislate on the subject, and given the Opinion in a note.

It is remarkable that nothing is to be found in the *Federalist* on these two clauses of the fourth Article; though, in No. 43, among the "miscellaneous powers" of Congress, some powers are considered which, according to the writer's (Mr. Madison's) view, are derived from some of the other provisions of the Article. From this it would seem that the authors of those letters did not give to these provisions any such construction as would be a basis for the legislative power of Congress.

<sup>2</sup> *Ante*, p. 380.

<sup>3</sup> See Parker, Ch. J., in 2 Pick., 19, and *post*, § 741.

<sup>4</sup> Compare the fuller statement of the parallel argument in § 729.



livery on claim of a fugitive from labor by persons who cannot, under the Constitution, hold the judicial power of the United States, it must be supposed that Congress has not proposed to carry into effect the judicial power of the United States in cases, according to the third and fourth construction.

The question whether the persons who have performed the actions authorized by the Acts of Congress relating to fugitives from labor have therein exercised power derived from the United States, and whether they have in such action carried out the delivery contemplated by the Constitution, will be hereinafter considered. If such action has in any cases been judicially justified as the exercise of power derived from the United States, and also as a full execution of the delivery required by the Constitution, such cases are authority against the idea that the legislation of Congress is intended to carry into effect powers vested in the judicial department.

The affirmation of the power in Congress necessarily involves the adoption of either the second, third or fourth of the constructions already stated, but does not of itself indicate which of the three has been received. But it may be observed that when, in justifying the legislation of Congress, it is affirmed that some legislation was necessary before the owner of a fugitive slave could make any claim in the State into which he escaped, the court or judge must have adopted the second construction. And that when in any case it is held that, independently of the Act of Congress, the owner might lawfully seize and remove him, the third or the fourth construction may have been adopted.

§ 737. But in marshaling the cases on this point it is necessary to call attention to the important distinction between a right under the provision itself, to seize the fugitive without process (in order either to remove him from the State, or to bring him before some magistrate of the forum, i. e. the State, *for the purpose of making the claim*, on which he may be delivered up), and a right of such seizure for the latter purpose only; whether it is regarded as a right arising under the provision, or one arising under the legislation of Congress.

§ 738. *Glen v. Hodges* (1812),<sup>1</sup> 9 Johns. 67, trespass for taking from plaintiff his slave on a writ of attachment against the slave for debt. The slave had been seized as a fugitive, in Vermont, by the plaintiff, but without warrant from any officer mentioned in the law of Congress, and there was no evidence that the seizure was with the intention of carrying before such officer for a certificate. *By the Court*:—"There is no doubt that the negro was the property of the plaintiff, and had run away from service into Vermont. He was held to service or labor under the laws of this State [New York] when he escaped, and the escape did not discharge him, but the master was entitled to reclaim him in the State to which he had fled. This is according to a provision in the Constitution of the United States (Art. 4, § 2), and the Act of Congress of the 12th February, 1793, prescribes the mode of reclaiming the slave. It not only gives a penalty against any person who shall knowingly and willingly obstruct the claimant in the act of reclaiming the fugitive, but saves to such claimant 'his right of action for any injury he may receive by such obstruction.' The plaintiff was therefore in the exercise of a right when he proceeded to reclaim the slave," &c. If the court regarded the right as the direct effect of the Constitution, acting as private law, it thereby supported the third or the fourth construction. Still the right may have been regarded as originating under the Act of Congress.

§ 739. In *Wright v. Deacon* (1819),<sup>2</sup> 5 Serg. & Rawle, 62, the alleged fugitive was in custody under a certificate given in conformity with the Act of Congress. On hearing motion to quash the writ *de homine replegiando* issued against the keeper of the prison, his custody under the certificate was sustained. Of the Opinion of the court, delivered by Tilghman, Ch. J., only the following passage bears on the question here considered.

<sup>1</sup> The earlier fugitive-slave case, *Butler v. Hopper* (1806), does not bear on the present inquiry. (See *ante*, p. 409.) The judicial opinions will be given in the chronological order of the cases. The reader will bear in mind that in the following chapters these opinions are necessarily presented in fragments, and that, thereby, some injustice may occasionally be done to the learned writers.

<sup>2</sup> The earlier case, *Commonwealth v. Holloway* (1816), 2 S. & R. 305, has no bearing on this question. See *ante*, p. 412.



After reciting the words of the Constitution, the judge says:—"Here is the principle: the fugitive is to be delivered up on claim of his master. But it required a law to regulate the manner in which this principle should be reduced to practice. It was necessary to establish some mode in which the claim should be made and the fugitive delivered up. Accordingly, it was enacted by Congress," &c. These observations are apparently inconsistent with the doctrine that the provision itself operates as private law according to the fourth construction; or creates cases or controversies, within the judicial power, to which the national Government is a party, according to one adaptation of the third construction. Nothing is said to indicate the person upon whom the duty to deliver up is imposed by the provision.<sup>2</sup>

§ 740. In *Hill v. Low* (1822), 4 Wash. C. C. 327, the action was for the penalty, by the fourth section of the Act of 1793, for obstructing the plaintiff in seizing his escaped slave in Philadelphia. It was alleged in pleading, and not denied, that

<sup>1</sup> The Opinion begins:—"This is a matter of considerable importance, and the court has therefore held it some days under advisement. Whatever may be our private opinions on the subject of slavery, it is well known that our Southern brethren would not have consented to become parties to a Constitution under which the United States have enjoyed so much prosperity unless their property in slaves had been secured. This Constitution has been adopted with the free consent of the citizens of Pennsylvania, and it is the duty of every man, whatever may be his office or station, to give it a fair and candid construction." The judge then recites the words of the constitutional provision, and proceeds as in the text above. It was superfluous in the judge to seek a justification for "fair and candid construction" of the Constitution. The introductory sentence has often been quoted in later cases, though it is difficult to see how any conclusion as to the legal effect of the clause can be drawn from it. It is principally worth noting as the commencement of a method of constitutional interpretation and construction which has not, as yet, received the sanction of judicial usage except in this class of cases. A court has no right to discriminate provisions of the Constitution as more or less essential to its existence, much less to distribute the powers of sovereignty according to such view. Judge McLean, in *McQuerry's case*, 5 McLean, 478, lays great stress on the importance which, "on information received from Ch. J. Marshall," was attached by the convention to the rendition of fugitive slaves. Other evidence as to the importance then attached to this provision is very meagre. Smith, J., 3 Wisc. 16. It is altogether derived from the report of the Debates in Madison papers, 1447, and is fully quoted by Judge Smith in 3 Wisc. 28-32 and 135. See also 9 Ohio, 144, 200, 237, where the counsel and judges examine it very particularly.

<sup>2</sup> 17 Am. Jurist, 107, remarks that the opinion in this case as to the constitutionality of the law of Congress was extra-judicial; that the case ought to have been decided on the ground that the plaintiff had already sued out a habeas corpus and been remanded on the return, and therefore could not have the writ *de homine replegiando*.



the plaintiff did "seize and arrest the said fugitive from labor to take him before a magistrate of the said city in order to prove before him," &c. The constitutionality of the Act of Congress seems to have been admitted, and there is nothing to indicate any judicial construction of the provision. The question whether the provision had given the owner the right to seize the slave and remove him from the State without first making his claim before some public authority, does not appear to have been raised. The judge of the U. S. District Court had charged in favor of the plaintiff's right to recover, and Judge Washington sustained his ruling; but still the decision is not opposed to the assertion that if the plaintiff had proposed to remove the slave from the jurisdiction of the State without making such claim, the defendant would have been justified in obstructing him.

§ 741. In *Commonwealth v. Griffith* (1823), 2 Pick. 11, the action was for the seizure of a fugitive slave without a warrant. "The defendant, accompanied by a deputy sheriff, but without any warrant or other legal process (though it appeared that application had been made by him to the District Judge of the United States, who had decided that a warrant or other process was not authorized by the Act of Congress, and was not necessary), seized Randolph [the slave] and kept him in confinement an hour or more, intending to have an examination before a magistrate pursuant to the act," &c., the act of 1793. The majority of the Massachusetts Supreme Court, regarding the seizure as made for the purpose of complying with the Act of 1793, held that Act to be constitutional and the seizure proper. Parker, Ch. J., said:—"The Constitution does not prescribe the mode of reclaiming a slave, but leaves it to be determined by Congress. It is very clear that it was not intended that application should be made to the executive authority of the State." The opinion of Judge Thatcher, dissenting, is only against a seizure without warrant, as not authorized either by the provision or by the law of Congress.<sup>1</sup> But since no opinion was given whether the owner's remedy depended entirely on some statute, or might exist, independently,

<sup>1</sup> See this question examined *post*, Ch. XXVII.

under the Constitution, there is nothing to indicate the court's or the dissenting judge's construction of the provision, or their theory of the legislative power of Congress.

§ 742. The case, *Johnson v. Tompkins* (1833), 1 Baldwin's C. C. R. 571, is principally to be noted as presenting an instance in which the local law of a free State (i. e. a State in which domiciled inhabitants could not be held in slavery) allowed the owner from another State to exercise the right of recaption, or seizure and removal without process. In that connection it will properly be considered in another chapter. The case is now referred to so far as it may maintain the doctrine that, independently of statute, this provision of the Constitution gives the owner the right to seize and remove the fugitive from the State in which he may be found, and in this may support the third or the fourth construction.

A slave belonging to the plaintiff, a resident of New Jersey, having escaped into Pennsylvania, was seized near the river separating the two States, by the plaintiff, and others, October, 1822, without a warrant, and, apparently, with the design of immediately removing him to New Jersey, without applying to any magistrate in Pennsylvania for any certificate, according to the Act of Congress, or any other delivering-up by public authority under the constitutional provision. While thus in possession of the slave, the plaintiff and his company were compelled, by the defendants and others, to go with them before a magistrate to answer the charge of kidnapping under the State law of 1820. On this charge the plaintiff and others were held to bail, tried in the county court, and acquitted. The negro, meanwhile, had been detained by the examining magistrate before whom the plaintiff and his associates had been brought on the charge of kidnapping, and on the plaintiff's acquittal was delivered up to him. The action in the U. S. Circuit Court was for trespass and false imprisonment. There is nothing in the "outline of the circumstances" given in the report, p. 572, to indicate an intention on the part of the owner (previously to his being detained by the defendants) to bring the alleged slave before a magistrate for the purpose of proving



his claim and obtaining authority to remove him.<sup>1</sup> Neither did the Circuit Judge, Baldwin, hold that the fact that the plaintiff had been acquitted by the county court, on the charge of kidnapping, was proof, as against the defendants in this action, of the plaintiff's having seized the slave with the intention of carrying him before a magistrate, according to the law of Congress of 1793. Judge Baldwin charged, p. 582:—"The record of their acquittal is conclusive evidence of their innocence of the offence charged in the indictment preferred against them at Norristown, either jointly or severally; you are bound to consider them each and every one as not guilty of any of the matters charged as a felony or offence under the Act of Assembly of March, 1820, or the common law." But besides adducing this as proof that the plaintiff had not done anything contrary to the local law, Judge Baldwin held that it was not necessary that the plaintiff should have made application to some public officer, in order to authorize his removing the slave out of the State. "Independently of this acquittal, if Jack was the slave of the plaintiff, neither he nor the others of his party could be guilty of kidnapping." On pages 582-590, Judge Baldwin sustains this view by showing that by the law of Pennsylvania, as it stood in 1822 (i. e., the local municipal law of the State), and independently of any effect of this provision of the Constitu-

<sup>1</sup> It does not appear from the report that the plaintiff's counsel in this action claimed that he had a right to remove his slave without a certificate under the Act of Congress. Counsel for the plaintiff in this case are reported, p. 575, to have argued:—"Jack is admitted to have been the slave of the plaintiff, who had, by the Constitution of the United States and the Act of February, 1793, a perfect right to take his slave within this State at any time he pleased, to use any force necessary for the purpose, to detain him a reasonable time before taking him to any magistrate, and to select any one before whom he would bring him." Counsel for the defendant argued:—"As the plaintiff claims his rights by law, he must obey it. \* \* \* When he arrests him [the slave] he is bound to take him before a magistrate, in order to procure a warrant for his removal, pursuant to the Act of Congress. No force can be used but in taking the slave to the magistrate or removing him out of the State after a warrant is obtained; and if the master does not follow the Act of Congress, he becomes answerable to the laws of the State punishing kidnapping, which, by the Act of 1820, consists in taking any colored person out of the State by force, unless done according to the provisions of that law. \* \* \* The plaintiff brought himself within the penal provisions of the Act of 1820, if he did not, immediately on the arrest of Jack, prove his property in him, and procure a warrant from a judge or magistrate; the offence is a felony, and he became liable to an arrest by any person who saw him in the act of removing Jack from  
<sup>2</sup>State without warrant."



tion of the United States, the owners of fugitive slaves might enter the State, seize them and remove them from its limits without applying to any civil authority. This part of the charge will be again noticed in the next chapter, as it has been sometimes cited among the authorities for the doctrine that the claimant may, by virtue of this provision in the Constitution, seize and remove the fugitive.

But Judge Baldwin also spoke of the rights which owners of slaves had under the Act of Congress, and of the fact that that Act had been recognized as constitutional by the Supreme Court of Pennsylvania. On page 594, he said:—"In addition to these rights, Mr. Johnson had one other important one to which we invite your special attention, and a comparison of the right given and the duty enjoined by the Constitution of the United States with the eleventh section of the Abolition Act of 1780." After reciting the constitutional provision, the judge said:—"Pursuant to this provision of the Constitution, the act of Congress of the 12th of February, 1793, was passed, not to restrain the rights of the master, but to give him the aid of a law to enforce them. This law has been read to you, together with the opinion of our respected predecessors in the case of *Hill v. Low*, to which we give our entire assent, so far as it affirms the unqualified right of the master to seize, secure, and remove his fugitive slave." The case which Judge Baldwin thus refers to has been hereinbefore noticed. According to the report, Judge Washington did not affirm "the unqualified right of the master to seize and *remove* his fugitive slave." The question of the existence of such a right was not made, and the opinion, if it had been pronounced, would have been extra-judicial.<sup>1</sup>

Next, in Judge Baldwin's Opinion, follows, with marks of quotation, as if copied from *Hill v. Low*, a summary of the act of 1793, which, however, is not to be found in the report of the case in 4 Wash., and also, with quotation marks, the following sentences, which likewise are not to be found in that

<sup>1</sup> This mis-citation by Judge Baldwin deserves especial notice as an important link in the historical development of the doctrine that this provision gives the claimant a right to seize and remove the fugitive, and the connected doctrine that, in this provision, slaves are recognized as chattels, and not persons.

report:—"By this it clearly appears that the claimant, his agent or attorney, has the authority of this law to seize and arrest, without warrant or legal process, the fugitive he claims, and *that* without being accompanied by any civil officer, though it would be prudent to have such officer keep the peace. Whilst thus seized and arrested, the fugitive is as much in the custody of the claimant, his agent or attorney, as he would be in that of a sheriff or other officer of justice having legal process to seize and arrest, who may use any place proper in his opinion for temporary and safe custody.'" The quotation marks in these instances must have been the error of the press, and the passages thus marked original with Judge Baldwin. Judge Baldwin then said:—"Do you perceive in this anything discordant with the feelings, the spirit, the policy, or the legislation of Pennsylvania as manifested in the abolition act, or the one passed to amend and explain it? Do these constitutional and legal provisions give any right to the plaintiff, or enjoin any duty on others, which are not the fundamental principles of her own laws, as acted on and enforced in her own courts, as of paramount and supreme authority? If you have any doubt, here is the opinion of one of the most humane and benevolent judges who ever presided in any court, the late Chief Justice Tilghman, in delivering the opinion of the Supreme Court of this State." Judge Baldwin then cited from *Wright v. Deacon*, 5 S. & R. 63, Tilghman's remarks supporting the constitutionality of the law of 1793. But it will be remembered that in that case the fugitive was in custody, under a certificate given by a State judge, under the act of 1793; it does not appear whether he had been brought before that judge with or without warrant, and it was expressly said by Judge Tilghman that the owner's right to "arrest such fugitive and carry him before" a judge, &c., was derived from the statute. Judge Tilghman said nothing of a right to seize and remove the slave without the action of some civil authority, and such a right was not claimed.

Judge Baldwin infers from these cases that the Supreme Court of Pennsylvania must be held, in *Wright v. Deacon*, to interpreted the constitutional provision as meaning, that



fugitive slaves shall be treated in the States into which they may escape in the same manner as they might be in the State from which they had fled. On p. 596: "This is the spirit of the law, policy and feeling of Pennsylvania, as declared by the Supreme Court; and if the acts and proceedings of the inferior courts and judges in opposition to the rights of the owners of fugitive slaves [referring to the writ *de hom. rep.* in *Wright v. Deacon*] are quashed as illegal, of what nature must be the lawless conduct of individuals who, by an assumed authority, undertake to obstruct the execution of the supreme law of the land?"

The portion of Judge Baldwin's charge<sup>1</sup> immediately fol-

<sup>1</sup> "The Supreme Court declares that the Constitution of the United States would never have been formed or assented to by the southern States without some provision for securing their property in slaves. Look at the first Article and you will see that slaves are not only property as chattels, but political property, which confers the highest and most sacred political rights of the States, on the inviolability of which the very existence of this Government depends.

"The apportionment among the several States, comprising this Union, of their representatives in Congress.

"The apportionment of direct taxes among the several States.

"The number of electoral votes for President and Vice-President to which they shall respectively be entitled.

"The basis of these rights is, 'according to their respective numbers, which shall be determined by adding to the whole number of free persons, including those bound to service for a term of years, and excluding Indians, not taxed, *three fifths of all other persons.*' So that, for all these great objects, five slaves are, in federal numbers, equal to three freemen. You thus see that in protecting the rights of a master in the property of a slave, the Constitution guarantees the highest rights of the respective States, of which each has a right to avail itself, and which each enjoys in proportion to the number of slaves within its boundaries.

"This was a concession to the southern States; but it was not without its equivalent to the other States, especially the small ones—the basis of representation in the Senate of the United States was perfect equality, each being entitled to two senators—Delaware had the same weight in the Senate as Virginia.

"Thus you see that the foundations of the Government are laid, and rest on the rights of property in slaves. The whole structure must fall by disturbing the corner-stone. If federal numbers cease to be respected or held sacred in questions of property or government, the rights of the States must disappear, and the Government and the Union dissolve by the prostration of its laws before the usurped authority of individuals.

"We shall pursue this subject no further, in its bearing upon the political rights of the States composing the Union. In recalling your attention to these rights, which are the subject of this controversy, we declare to you as the law of the case that they are inherent and inalienable, so recognized by all our fundamental laws.

"The Constitution of the State or Union is not the source of these rights, or the others to which we have referred you; they existed in their plenitude before any constitutions, which do not create but protect and secure them against any violation, by the Legislatures or courts, in making, expounding, or administering laws.

"The nature of this case, its history, and the course of the argument, call on



lowing the last quotation is remarkable as the development of that peculiar style of argument, on questions of this class, which has been adopted by more than one other distinguished judge since it was originated by Chief Justice Tilghman. It is given in the note below.

Independently of the erroneous citation of the two cases upon which the earlier part of the argument is founded, it is doubtful whether Judge Baldwin did not intend to rest the owner's right to seize and remove the slave upon the several law of Pennsylvania, rather than on the provision acting as national law in all the States.

§ 743. In the case of *Jack v. Martin* (1834), 12 Wendell, Chief Justice Nelson, delivering the opinion of the Supreme Court of New York, seems to have regarded the provision as taking effect directly on private persons in the first instance, according to the fourth construction, while yet also maintaining the second or the third construction as the basis of the power of Congress. Judge Nelson not only regarded the right of seizure, allowed by the statute for the purpose of making a claim, as a right existing by the provision itself, but also spoke of the right of seizure and removal as part of the effect of the clause, which, in his view, carried the rights of the owner into

us to declare explicitly what is the effect of a constitutional protection or guarantee of any right, or the injunction of any duty. The twenty-sixth section of the bill of rights in the Constitution of Pennsylvania is in these words: 'To guard against transgressions of the high powers we have delegated, we declare [we, the people of Pennsylvania,] that everything in this article is excepted out of the general powers of Government, and shall forever remain inviolate.' A higher power declares this Constitution, and the laws of the United States which shall be made in pursuance thereof, shall be the supreme laws of the land, and the judges in every State shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding.' Const. U. S. Art. 6, clause 2.

"An amendment of the Constitution is of still higher authority, for it has the effect of controlling and repealing the express provisions of the Constitution authorizing a power to be exercised, by a declaration that it shall not be construed to give such power. 3 Dall. 382.

"We have stated to you the various provisions of the Constitution of the United States, and its amendments, as well as that of this State; you see their authority and obligation to be supreme over any laws or regulations which are repugnant to them, or which violate, infringe, or impair any right thereby secured; the conclusions which result are too obvious to be more than stated.

"Jack was the property of the plaintiff, who had a right to possess or protect his slave or servant, whom he had a right to seize and take away to his residence in New Jersey by force, if force was necessary; he had a right to secure him

see or rescue by any means not cruel or wantonly severe."

10, J., 16 Peters', 645.

the State in which the slave had fled. On page 311, he said:—"The right of the master to take the slave without a warrant, according to the provisions of the statute of 1793, would appear to follow as a necessary consequence from the undoubted position that under this clause of the Constitution the right and title of the owner to the service of the slave is as entire and perfect within the jurisdiction of the State *to which* he has fled as it was in the one *from* which he escaped. Such seizure would be at the peril of the party; and if a freeman was taken, he would be answerable like any other trespasser or kidnapper." If this is to be understood in the full extent of the words it would justify the owner, not only in the seizure, but also in removing the slave without making any application to any civil authority within the jurisdiction. In the instance which had actually come before the court, however, the seizure had been followed by the claimant's bringing the slave before a State magistrate, according to the terms of the Act of Congress.

In maintaining the validity and exclusive operation of the Act of Congress, Judge Nelson also used expressions which may support the second construction, but which harmonize best with that adaptation of the third construction which attributes to the national Government a duty correlative with the claimant's right. On page 319 of the report, the Chief Justice said:—"It [the provision] implies a doubt whether they [the States] would, in the exercise of unrestrained power, regard the rights of the owner or properly protect them by local legislation.<sup>1</sup> The object of the provision being thus pal-

<sup>1</sup> So on page 311, Judge Nelson said:—"The idea that the framers of the Constitution intended to leave the legislation of this subject to the States, when the provision itself obviously sprung out of their fears of partial and unjust legislation by the States in respect to it, cannot be admitted." It is admitted on all hands that if this provision had not been introduced into the Constitution the owner's claim to a delivery of his fugitive slave would have depended entirely upon the several will of the State into which he might have escaped. Yet, in these places the judge speaks of the owner's claim as a legal right, independently of this provision, or as one which the State would have been under a legal obligation to recognize. The jurists of the slaveholding States insist that all states are bound by comity to allow the owner to recapture the fugitive slave. But that is matter of opinion as to what ought to be a doctrine of international law. It is nothing to the purpose here. Any man may hold that opinion; but a judge being of that opinion has no ground for declaring that the claim, as against a non-



pable, it should receive a construction that will operate most effectually to accomplish the end consistently with the terms of it. This, we may reasonably infer, will be in accordance with the intent of the makers, and will regard with becoming respect the rights of those especially interested in its execution. Which power, then, was it intended should be charged with the duty of prescribing the mode in which this injunction of the Constitution should be carried into effect, and of enforcing its execution—the States or Congress? It is very clear, if left to the former, the great purpose of the provision might be defeated in spite of the Constitution. The States might omit any legislation on the subject, and thereby leave the owner without any known means by which to assert his rights.” And on page 320 :—“I am satisfied, from an attentive perusal of the provision, that a fair interpretation of the terms in which it is expressed not only prohibits the States from legislation upon the question involving the owner’s right to this species of labor, but that it is intended to give Congress the power to provide the delivering up of the slave.” And on page 321 :—“It is obvious that if Congress have not the power to prescribe the mode and manner of the ‘delivering up,’ and thereby provide the means of enforcing the execution of the rights secured by this provision, its solemn guaranty may be wholly disregarded in defiance of the Government. This power seems indispensable to enable it faithfully to discharge the obligation to the States and citizens interested. The subject itself, as well from its nature as from the persons alone interested in it, seems appropriately to belong to the national Government; it concerns rights held under the laws to be enforced within the jurisdiction of States other than those in which the citizens generally interested in them reside, and on a subject too well known deeply to affect the public mind, and in respect to which distinct and adverse interests and views had already appeared in the Union. It was therefore fit and

slaveholding State, is founded on a *legal* right, or for intimating that, in the absence of any provision in the Constitution, the legislation of a State in respect to fugitive slaves within its borders can be called “partial and unjust,” when it refuses to recognize the claims of a pursuing master. The same confusion of ideas prevails in the argument of Judge Baldwin, already noted.



proper that the whole matter should be placed under the control of Congress, where the rights and interests of the different sections of the country liable to be influenced by local and peculiar causes would be regulated and enforced with an impartial regard to all."

This language would accord best with the opinion that the provision is not, in itself, private law determining rights and obligations of private persons in a legal relation, but that some legislation is necessary before it can have such effect.

Judge Nelson attributes power to Congress without saying clearly that it is part of the power granted, in the last clause of the eighth section of the first Article, "to carry into execution" a power vested by this Constitution in the Government of the United States, or in some "department or officer thereof." He makes no allusion to any power of the judiciary in such "case" or "controversy." But the judge plainly indicates the national Government as the person upon whom the provision imposes an obligation correlative to the claimant's right. He observes that "its"—the provision's—"solemn guaranty may be wholly disregarded" (not saying by whom) "in defiance of the Government," meaning, apparently, the national Government, and says that power in *Congress* "to prescribe the mode and manner of the delivering up, and thereby provide the means of enforcing the execution of the rights secured by this provision" is "indispensable to enable it" (i.e., the Government) faithfully to discharge the obligation to the States' and citizens interested." He further says that "the subject itself" "seems appropriately to belong to the national Government."

Judge Nelson may, on the whole, be taken to support that adaptation of the third construction under which the provision creates a relation of right and obligation between the claimant and the national Government, and under which a power is attributed to the integral Government, not to the judiciary de-

<sup>1</sup> Here appears the idea which also prevails in the portion of Judge Baldwin's opinion which is given in the note *ante*, p. 445, that the State from which the fugitive from labor escaped is a party having a right under this provision.

partment, which may be the foundation of a power of legislation in Congress.<sup>1</sup>

§ 744. On hearing this case before the Court for the Correction of Errors, the judgment of the Supreme Court was affirmed. But it was affirmed solely on the ground that the plaintiff had by his pleas admitted that he was the slave of the defendant, and had escaped from her service, and that the defendant was therefore entitled to judgment in her favor, and the court expressly declined to pass upon the constitutionality of the law of Congress and of the statute of the State under which the action had been brought.<sup>2</sup> Opinions were delivered on this occasion by only two members of the court, Senator Bishop and the Chancellor, Walworth. The Senator maintained the legislation of Congress.<sup>3</sup> He held that it was a carrying into

<sup>1</sup> On p. 322, Judge Nelson says:—"The above view [meaning, apparently, view of the power of Congress] is in strict accordance with the decisions of this court upon the clause in question, so far as it has come under consideration, and also with those under the analogous provision respecting fugitives from justice," and refers to *Glen v. Hodges*, 9 Johns. 67, in which case, however, there was no opinion as to the basis of the legislative power of Congress. Nor does the question appear ever to have been discussed in New York, in any case of a fugitive from justice.

<sup>2</sup> 14 Wendell, 507 and note. For this reason the opinions of the Chancellor and Senator Bishop are here placed in a note as having been extra-judicial; though, if the court was right in its position, it would seem that Judge Nelson's opinion in the court below was, likewise, extra-judicial. If the Court for the Correction of Errors meant to affirm the right of the owner to a delivery of the slave, independently of the law of Congress and the State statute, they thereby construed the provision to operate as private law, and so supported the fourth construction.

<sup>3</sup> His language, on p. 531 of the Report, is:—"In arriving at a conclusion upon these points, it becomes necessary to inquire what powers have been conferred upon Congress by the Constitution; and, if upon such inquiry it be found that the law of Congress in reference to fugitive slaves is recognized by the express or implied powers of the Constitution, whether the State law must yield to the law of Congress." After quoting the constitutional provision, Senator Bishop said, "The first Article, section eight, and last clause of the Constitution, authorizes Congress to make all laws which shall be necessary and proper for carrying into execution the foregoing powers and all other powers vested by the Constitution in the Government of the United States, or in any department or officer thereof; not only giving to Congress certain powers there enumerated, but giving authority to legislate upon an infinite variety of subjects which the framers of the Constitution evidently anticipated would arise under it when the practical operation of the Government was more fully and completely developed. The doctrine laid down by the Federalist is, that the Constitution, in defining the power of Congress, evidently specified those which were matters of immediate and general interest, leaving Congress to regulate other matters by law, as the exigency of the case might require. Upon the authority of the foregoing clauses of the Constitution, Congress passed a law," &c. It will be noticed that he refers to the Federalist as attributing powers of legislation, as to matters not specified, to Congress in the



execution of a power vested by the Constitution in the Government of the United States, or in some department or officer thereof. As he did not affirm that the power vested was a power in the national Government, nor say that the provision was a rule acting on that Government, or on States as its subjects, he may have intended a power vested in the judiciary to apply a rule of private law contained in this provision, and so have supported the fourth construction. His language necessarily indicates an adoption of either the third or the fourth.

The Opinion delivered by the Chancellor on this occasion has been generally misunderstood. He did not, as commonly misrepresented, maintain the first of the four constructions, nor view the provision as an international treaty to be fulfilled only by the several political action of the States into which fugitives might escape. He did not deny that Congress might legislate, if it should be necessary to secure to the owner the right guaranteed by the Constitution. His doctrine is, that the Act of Congress could not prevent a trial of the master's right before a jury, whenever an appeal should be made to the State judiciary against his claim to the person of an alleged fugitive. The main point of his Opinion was his assertion of concurrent State jurisdiction, and particularly of the validity of the State law under which the case had arisen. But in the present inquiry it is only necessary to refer to the Chancellor's opinion as indicating his construction of the provision.<sup>1</sup>

first instance; that is independently of the existence of some power in the national Government or some department or officer thereof. It would have been better had the Senator pointed out the passage in the Federalist in which he had discovered this doctrine.

<sup>1</sup> 14 Wendell, 525, the Chancellor said:—"I have looked in vain among the powers delegated to Congress by the Constitution, for any general authority to that body to legislate on this subject. It certainly is not contained in any express grant of [526] power, and it does not appear to be embraced in the general grant of incidental powers contained in the last clause of the Constitution relative to the powers of Congress. *Const., Art. I, § 8, sub. 17.* The law of the United States respecting fugitives from justice and fugitive slaves is not a law to carry into effect any of the powers expressly granted to Congress 'or any other power vested by the Constitution in the Government of the United States, or any department or officer thereof.' It appears to be a law to regulate the exercise of the rights secured to the individual States or the inhabitants thereof by the second section of the fourth Article of the Constitution; which section, like the ninth section of the first Article, merely imposes a restriction and a duty upon other States and individuals in relation to such rights, but *vests no power* in the federal Government, or any department or officer thereof, except the *judicial power* of declaring and en-



It will be seen from the passages cited from his Opinion, that the Chancellor clearly supported the fourth construction, regarding the provision as continuing, independently of either State or national legislation, the relation of master and slave in the State into which the fugitive had escaped; so that the master might even lawfully seize and remove his slave from the State in which he should be found; though liable always to account to the State for such action by showing his title before its judicial tribunals under the forms of procedure prescribed by the local law. But the master's custody, on such

forcing the rights secured by the Constitution. The Act of February, 1793, conferring ministerial powers upon the State magistrates, and regulating the exercise of the powers of the State executive, is certainly not a law to carry into effect the judicial power of the United States, which power cannot be vested in State officers. If the provisions of the Constitution, as to fugitive slaves and fugitives from justice, could not be carried into effect without the actual legislation of Congress on the subject, perhaps a power of federal legislation might be implied from the Constitution itself; but no such power can be inferred from the mere fact that it may be more convenient that Congress should exercise the power, than that it should be exercised by the State Legislatures. In these cases of fugitive slaves and fugitives from justice, it is not certain that any legislation whatever is necessary, or was contemplated by the framers of the Constitution. The provision as to persons escaping from servitude in one State, into another, appears, by their journals, to have been adopted by a unanimous vote of the Convention. At that time the existence of involuntary servitude, or the relation of master and servant, was known and recognized by the laws of every State in the Union, except Massachusetts, and the legal right of recaption existed in all as part of the customary or common [527] law of the whole confederacy. On the other hand the common law writ of *homine replegiando*, for the purpose of trying the right of the master to the services of the slave, was well known to the law of the several States, and was in constant use for that purpose, except so far as it had been superseded by the more summary proceeding by *habeas corpus*, or by local legislation. The object of the framers of the Constitution, therefore, was not to provide a new mode by which the master might be enabled to recover the services of the fugitive slave, but merely to restrain the exercise of a power which the State Legislatures, respectively, would otherwise have possessed to deprive the master of such pre-existing right of recaption. Under this provision of the constitution, even without any legislation on the subject, the right of the master to reclaim the fugitive slave is fully secured so as to give him a valid claim in damages against any one who interferes with the right" (citing *Glen v. Hodges*, 9 Johns. R. 67, as to the same effect). And on the same page:—"The judicial tribunals of the respective States are bound by their oaths to protect the master's constitutional right of recaption against any improper legislation, and against the unauthorized acts of individuals by which such right may be impaired; and the Supreme Court of the United States, as the tribunal of dernier resort on such a question, is possessed of ample powers to correct any erroneous decision which might be made against the right of the master." And on p. 528:—"The Constitution of the United States having secured to the master the right of recaption, it is, of course, a good defence to the present suit if it is admitted on the record that the plaintiff owed service or labor to the defendant in another State, and had escaped from such servitude without reference to the validity of the Act of Congress, or of any State Legislature on the subject."

seizure, would always be lawful, so that whoever should rescue such slave from that custody would do it at the risk of an action by such master for damages.<sup>1</sup>

§ 745. In February Term, 1836, before the New Jersey Superior Court, was the case, *The State v. The Sheriff of Burlington*, otherwise called Helmsley's case, which has already been noted in connection with the question of the validity of the statute of the State.<sup>2</sup>

<sup>1</sup> The Chancellor's doctrine seems to have been also that of the Committee on the Judiciary of the Massachusetts House of Representatives, which, in 1837, reported "on the expediency of restoring the writ of *hominem replegiando*, or of providing some other process by which one under personal restraint may try his liberty before a jury." See *Am. Jurist*, vol. XVII., p. 104. The bill reported by the Committee passed both branches of the Legislature without objection. *Ibid.* 95. See note, *ante*, p. 32.

<sup>2</sup> *Ante*, p. 64. The portion of Chief Justice Hornblower's Opinion which bears most directly on the present inquiry is as follows:—

"By the 2d clause of the 6th Art. of the Constitution of the United States, it is declared that the Constitution and laws of the United States '*made in pursuance thereof*' shall be the SUPREME law of the land, and that the judges in every State shall be bound thereby, 'anything in the Constitution or laws of any State to the contrary notwithstanding.' If, then, Congress has a right to legislate on this subject, the Act of Congress must prevail, and the statute of New Jersey is no better than a dead letter. They cannot both be the SUPREME law of the land, and constitute the rule of action in one and the same matter. The judges of this State are bound by the Act of Congress, anything in the constitution or law of this State to the contrary notwithstanding. If both acts were precisely the same in all their provisions and sanctions, yet a proceeding in conformity therewith would derive all its authority from the Act of Congress, and not from the law of this State. But the provisions of the two statutes are very dissimilar, and as the proceedings in this case profess to be in pursuance of the act of this State, it follows, of course, upon the supposition that Congress has a right to legislate in the matter, that the prisoner has been unlawfully committed, and ought to be discharged out of the custody of the Sheriff. Upon this ground I might refrain from all further discussion, and render my judgment at once; but then I should be understood as fully admitting the right of Congress to legislate upon the subject—an admission I am by no means prepared to make, any more than I am to express a contrary opinion. I intend only to assign the reasons why I do not at once admit the supremacy of the Act of Congress, reserving to myself the right of forming and expressing a final decision hereafter, if in this or in any other case such decision shall become necessary.

"The 1st and 2d sections of the 4th Article of the Constitution of the United States are declarative of certain international principles agreed upon between the parties to that instrument."

Here the judge cites the four several provisions, and proceeds to say:—

"By adopting the Constitution, the several States became bound to carry out in practice these several constitutional principles; but whether the manner of doing so is to be regulated by State legislation, or by general Acts of Congress, is the question. The framers of the Constitution thought proper (and it is to be supposed that they did so for some sufficient reason) to arrange the four particulars, above mentioned, under two distinct sections. By the first it is provided that full faith and credit shall be given in each State to the public acts, records, &c., of every other State. But it does not stop here; if it did, this provision would stand in the same category with those contained in the next section, and



Although in this case the constitutionality of the Act of Congress was not before the court, yet it was hardly possible to determine the legality of the custody claimed in that case without reference to the effect of the provision in the Constitution. As an authority on this question of construction,

there would seem to have been no reason for the distribution of these principles into distinct sections. But it is added:—'And the Congress may, by general laws, prescribe the manner in which said acts, &c., shall be proved, and the effect thereof.' Then follows the 2d section, embracing the other three principles above mentioned, but *without* annexing to them, or to either of them, the right of legislation by the general Government. Hence, there seems to arise a fair argument that the framers of the Constitution had no idea that the simple statement of these several international stipulations would confer on Congress any legislative powers concerning them; but as they designed to subject the first particular to the control and regulation of the general Government, they arranged it under a distinct section, and in express terms annexed to it the power of legislation, and then threw the other three stipulations together in another section of the instrument without saying anything more, because no such power was intended to be given to Congress respecting them. A different construction would expose the authors of the Constitution to the charge of encumbering it with a useless provision, worse, indeed, than useless, because, if simply writing down and adopting the several conventional principles comprehended in the second section carried along with them a right in the general Government to provide by law for the manner in which they should be executed, the express grant of such a power in the preceding section was not only useless, but calculated to create a doubt and uncertainty as to the right of the Congress to legislate on matters contained in the second section. For if the power of legislation is impliedly annexed to the simple stipulations of the 2d section, it is difficult to perceive why the same implication would not have arisen upon the simple declaration that full faith and credit should be given to the public acts of one State, in the courts of every other State. That the Constitution has, in express terms, given the right of legislation to Congress in reference to one of the four conventional items above mentioned, and remained silent in respect to the others, is, to my mind, a strong argument that no such power was intended to be given in connection with them.

"Again: Are there not sound political as well as judicial reasons for granting to Congress the power of legislation in the one case, and withholding it in the others? No one State could prescribe the manner in which its own public acts, records, and judicial proceedings should be proved in the courts of another State. The rule of evidence is *lex loci*, and every court might have required a different mode of proof. This would have been very inconvenient. It was desirable, therefore, that there should be one uniform rule throughout the country on that subject. But the manner and form in which public acts and records should be exemplified was a matter about which Congress may safely legislate without decomposing the pride and complacency of State sovereignty, and without the danger of coming into conflict with State institutions and local jurisprudence. Not so in respect to the other stipulations. Legislation by Congress, regulating the manner in which a citizen of one State should be secured and protected in the enjoyment of his citizenship in another, would cover a broad field, and lead to the most unhappy results. So, too, general Acts of Congress, prescribing by what persons or officers, with or without process, refugees from justice, or persons escaping from labor may be seized or arrested in one State, and forcibly carried into another, can hardly fail to bring the general Government into conflict with the State authorities, and the prejudices of local communities. Such, to some extent, has been the case in this and other States. A constructive power of legislation in Congress is not a favorite doctrine of the present day. By a large portion of the country, the right of Congress to legislate on the subject of slavery at



Chief Justice Hornblower's Opinion is not altogether extrajudicial. That portion of the Opinion in which his construction is set forth, is given in the note. It will be seen that he maintains the first of the constructions hereinbefore enumerated.

§ 746. In the matter of Peter, *alias* Lewis Martin, about the year 1837, 2 Paine's C. C. R. 348, Judge Thompson said, *ib.* 354:—"But it is said that Congress has no power to legislate at all upon this subject, there being no express delegation of such power in the Constitution. The provision is," &c. "This provision contains a prohibition to the States to pass any law discharging the persons escaping from the labor or service which he owes to another; and all such laws would be null and void, and no positive legislation might be necessary on the subject. But to secure the benefit of the latter part of the

all, even in the District and Territories over which it has exclusive jurisdiction, is denied, and surely, by such, it will not be insisted that Congress has a constructive right to prescribe the manner in which persons residing in the free States shall be arrested, imprisoned, delivered up, and transferred from one State to another, simply because they are claimed as slaves.

"In short, if the power of legislation upon this subject is not given to Congress in the 2d section of the 4th Article of the Constitution, it cannot, I think, be found in that instrument. The last clause of the 8th section of the 1st Article gives to Congress a right to make all laws which shall be necessary and proper for carrying into execution all the powers vested by the Constitution in the Government of the United States, or in any department or office thereof. But the provisions of the 2d section of the 4th Article of the Constitution covers no grant to, confides no trust, and vests no powers in the Government of the United States. The language of the whole office of that section is to establish certain principles and rules of action by which the contracting parties are to be governed in certain specified cases. The stipulations respecting the rights of citizenship, and the delivery of persons fleeing from justice, or escaping from bondage, are not grants of power to the general Government, to be executed by it, in derogation of State authority; but they are in the nature of treaty stipulations, resting, for their fulfillment, upon the enlightened patriotism and good faith of the several States.

"The argument in favor of Congressional legislation, founded on the suggestion that some of the States might refuse a compliance with these constitutional provisions, or neglect to pass any laws to carry them into effect, is entitled to no weight. Such refusal would amount to a violation of the national compact, and is not to be presumed or anticipated. The same argument carried out in its results would invest the general Government with almost unlimited power, and extend its constructive rights far beyond anything that has ever been contended for. The American people would not long submit to a course of legislation by Congress founded on no better authority than the unjust assumption that the States, if left to themselves, would not in good faith carry into effect the provisions of the Constitution.

"But, as I have said before, it is not my intention to express any definite opinion on the validity of the Act of Congress, nor is it necessary to do in this case, as the proceeding in question has not been in conformity with the provisions of this Act, but in pursuance with the law of this State."

provision, some legislation on the subject either by Congress or by the States is indispensable. It declares that the party escaping shall be delivered up to the party to whom he owes labor and service; but the mode and manner in which this is to be done and enforced must be provided for by law; the Constitution makes no provision on that subject, and it cannot be presumed that it was intended to leave this to State legislation. There is no express injunction upon the States to pass any laws on the subject, and unless they choose to do it, the great benefit intended to be secured to slaveholders would be entirely defeated. We know, historically, that this was a subject that created great difficulty in the formation of the Constitution, and that it resulted in a compromise not entirely satisfactory to a portion of the United States. But whatever our private opinions on the subject of slavery may be, we are bound in good faith to carry into execution the constitutional provisions in relation to it; and it would be an extravagant construction of this provision in the Constitution to suppose it to be left discretionary in the States to comply with it or not, as they should think proper."<sup>1</sup>

§ 747. The well-known case of *Prigg v. The Commonwealth of Pennsylvania* (1842), 16 Peters, 539, commonly called *Prigg's case*, is the leading authority on the construction of this clause, and the basis of the power of Congress. The point actually before the Court was, whether the law of Pennsylvania, of the 26th of March, 1826, sec. 1, was in violation of the Constitution of the United States, and, on the whole, it would appear that the Court decided that the State law was unconstitutional without reference to the law of Congress, and simply with reference to the existence of the constitutional provision.<sup>2</sup> If the Court were right in taking this posi-

<sup>1</sup> The case, *Dixon v. Allender*, in the Supreme Court of New York, August, 1837, 18 Wendell, 678, presents a question of practice. No judgment involving a decision on the validity of the law of Congress or the State law appears to have been pronounced.

<sup>2</sup> In 3 Wise, 115, Smith, J., commenting on this case, said:—"The majority of the Court decided that the clause gave the owner of a fugitive slave the right to seize him in any State of the Union, without process, and take him back to the State from which he escaped, and that the law of Pennsylvania which interfered with such right was repugnant to the clause itself, and therefore void. This was the point in judgment. This was the legal scope of the decision, and no more."



tion, the question of the constitutionality of the law of Congress could not, properly, be before the Court. But the co-ordinate question of the proper construction of the clause was necessarily passed upon. The questions considered by the Court were:—Has the owner, under the provision itself and irrespectively of the Act of Congress, an indefeasible right to seize his fugitive slave and remove him from the State?—Has the State any power to interfere with the owner in the exercise of that right, or any other power in reference to the right of such master and the obligation of the fugitive?—Has Congress power to legislate in respect to such right and obligation?—May the State magistrates mentioned in the Act of 1793 perform the functions in that Act designated?¹

Although this is not the proper place in this treatise for considering all these questions, yet they are so intimately connected with the questions which in this chapter are to be examined, that the *Opinion of the Court* is given here in full, from 16 Peters, 608, as delivered by Mr. Justice Story.

§ 748. "This is a writ of error to the Supreme Court of Pennsylvania, brought under the 25th section of the judiciary act of 1789, ch. 20, for the purpose of revising the judgment of that Court, in a case involving the construction of the Constitution and laws of the United States.

"The facts are briefly these: The plaintiff in error was indicted, in the Court of Oyer and Terminer for York county, for having, with force and violence, taken and carried away from that county, to the State of Maryland, a certain negro

¹ Mr. Johnson, Attorney-General and of Counsel for Pennsylvania (16 Peters', 591) stated the three points arising in the case, as follows:—

"1. Is the power of prescribing the mode of delivering up fugitives from service or labor under the 2d section of the 4th Article of the Constitution exclusively vested in the national Government?

"2. If it is not, is it concurrently vested in the State and general Governments, to be exercised on particular terms? or is it solely vested in the State Governments?

"3. Have the States the right to inflict penalties, as in cases of crimes, upon those who seize and remove fugitive slaves out of their territory without pursuing the mode prescribed either by the Act of Congress of 1793, or by acts passed on the same subject by the States themselves?" He then says:—"The last of these three questions is the most material in the present case; perhaps it is the only real question in this case, upon which the Court is imperatively called to pronounce its judgment." And the same position is supported with great force, *ib.* 601, &c.



woman, named Margaret Morgan, with a design and intention of selling and disposing of, and keeping her as a slave or servant for life, contrary to a statute of Pennsylvania, passed on the 26th of March, 1826. That statute in the first section, in substance, provides, that if any person or persons shall, from and after the passing of the act, by force and violence take and carry away, or cause to be taken and carried away, and shall by fraud or false pretence seduce, or cause to be seduced, or shall attempt to take, carry away, or seduce any negro or mulatto from any part of that commonwealth, with a design and intention of selling and disposing of, or causing to be sold, or of keeping and detaining, or of causing to be kept and detained, such negro or mulatto as a slave or servant for life, or for any term whatsoever; every such person or persons, his or their aiders or abettors, shall, on conviction thereof, be deemed guilty of a felony, and shall forfeit and pay a sum not less than five hundred, nor more than one thousand dollars; and moreover, shall be sentenced to undergo a servitude for any term or terms of years, not less than seven years nor exceeding twenty-one years; and shall be confined and kept to hard labor, &c. There are many other provisions in the statute which is recited at large in the record, but to which it is in our view unnecessary to advert upon the present occasion.

"The plaintiff in error pleaded not guilty to the indictment; and at the trial the jury found a special verdict, which, in substance, states, that the negro woman, Margaret Morgan, was a slave for life, and held to labor and service under and according to the [609] laws of Maryland, to a certain Margaret Ashmore, a citizen of Maryland; that the slave escaped and fled from Maryland into Pennsylvania in 1832; that the plaintiff in error being legally constituted the agent and attorney of the said Margaret Ashmore, in 1837, caused the said negro woman to be taken and apprehended as a fugitive from labor, by a State constable, under a warrant from a Pennsylvania magistrate; that the said negro woman was thereupon brought before the said magistrate, who refused to take further cognizance of the case; and thereupon the plaintiff in error did remove, take, and carry away the said negro woman and her

children out of Pennsylvania into Maryland, and did deliver the said negro woman and her children into the custody and possession of the said Margaret Ashmore. The special verdict further finds, that one of the children was born in Pennsylvania, more than a year after the said negro woman had fled and escaped from Maryland.

"Upon this special verdict, the Court of Oyer and Terminer of York county adjudged that the plaintiff in error was guilty of the offence charged in the indictment. A writ of error was brought from that judgment to the Supreme Court of Pennsylvania, where the judgment was, *pro forma*, affirmed. From this latter judgment, the present writ of error has been brought to this Court.

"Before proceeding to discuss the very important and interesting questions involved in this record, it is fit to say, that the cause has been conducted in the Court below and has been brought here, by the co-operation and sanction both of the State of Maryland and the State of Pennsylvania, in the most friendly and courteous spirit, with a view to have those questions finally disposed of by the adjudication of this Court; so that the agitations on this subject in both States, which have had a tendency to interrupt the harmony between them, may subside, and the conflict of opinion be put at rest. It should also be added, that the statute of Pennsylvania of 1826 was (as has been suggested at the bar) passed with a view of meeting the supposed wishes of Maryland on the subject of fugitive slaves; and that, although it has failed to produce the good effects intended in the practical construction, the result was unforeseen and undesigned.<sup>1</sup>

<sup>1</sup> 3 Wis. 112. Judge Smith, in Booth's case, says:—"In the first place, it should be observed that the decision of the case [Prigg's case] by the State Supreme Court was *pro forma* merely. The responsibility of deciding upon the matter by the latter court was avoided, if my memory serves me, in conformity with a special act of the legislature of that State, and by common consent the United States Supreme Court was charged therewith. The question of jurisdiction was not raised at all. Jurisdiction was assumed and the case proceeded, in order to put to rest certain vexed and agitating questions; with what success time and experience have unfortunately shown. If that court had no jurisdiction, that fact alone would strip its decision of all claim to authority. However patriotic the motives which induced the one court to concede, and the other to assume jurisdiction, it is not improper perhaps to remark that one State has not the right to make a mere *pro forma* decision upon a given subject matter, for the pur-



"1. The question arising in the case, as to the constitutionality of the statute of Pennsylvania, has been most elaborately argued at [610] the bar. The counsel for the plaintiff in error have contended that the statute of Pennsylvania is unconstitutional; first, because Congress has the exclusive power of legislation upon the subject-matter under the Constitution of the United States, and under the act of the 12th of February, 1793, ch. 51 (7), which was passed in pursuance thereof; secondly, that if this power is not exclusive in Congress, still the concurrent power of the State legislatures is suspended by the actual exercise of the power by Congress; and thirdly, that if not suspended, still the statute of Pennsylvania, in all its provisions applicable to this case, is in direct collision with the act of Congress, and therefore is unconstitutional and void. The counsel for Pennsylvania maintain the negative of all these points.

"Few questions which have ever come before this Court involve more delicate and important considerations; and few upon which the public at large may be presumed to feel a more profound and pervading interest. We have accordingly given them our most deliberate examination; and it has become my duty to state the result to which we have arrived, and the reasoning by which it is supported.

"Before, however, we proceed to the points more immediately before us, it may be well—in order to clear the case of difficulty—to say, that in the exposition of this part of the Constitution, we shall limit ourselves to those considerations which appropriately and exclusively belong to it, without laying down any rules of interpretation of a more general nature. It will, indeed, probably, be found, when we look to the character of the Constitution itself, the objects which it seeks to attain, the powers which it confers, the duties which it enjoins, and the rights which it secures, as well as the known historical

pose of conferring jurisdiction upon the Supreme Court of the United States, and by such process to bind every other State. If one State chooses voluntarily to relinquish its own sovereignty, it by no means follows that the other States have thereby relinquished theirs. If the consent of Pennsylvania *could* give jurisdiction in that case, hers was not the consent of all. If there was no jurisdiction, the decision is without legal effect for any purpose."



fact that many of its provisions were matters of compromise of opposing interests and opinions; that no uniform rule of interpretation can be applied to it which may not allow, even if it does not positively demand, many modifications in its actual application to particular clauses. And, perhaps, the safest rule of interpretation after all will be found to be to look to the nature and objects of the particular powers, duties, and rights, with all the lights and aids of contemporary history; and to give to the words of each just such operation [611] and force, consistent with their legitimate meaning, as may fairly secure and attain the ends proposed.<sup>1</sup>

"There are two clauses in the Constitution upon the subject of fugitives, which stand in juxtaposition with each other, and have been thought mutually to illustrate each other. They are both contained in the second section of the fourth article, and are in the following words," &c., giving the words of the two provisions. Judge Story then says:—

"The last clause is that, the true interpretation whereof is directly in judgment before us. Historically, it is well known, that the object of this clause was to secure to the citizens of the slaveholding States the complete right and title of ownership in their slaves, as property, in every State in the Union into which they might escape from the State where they were held in servitude. The full recognition of this right and title was indispensable to the security of this species of property in all the slaveholding States; and, indeed, was so vital to the preservation of their domestic interests and institutions, that it cannot be doubted that it constituted a fundamental article, without the adoption of which the Union could not have been formed. Its true design was to guard against the doctrines and principles prevalent in the non-slaveholding States, by

<sup>1</sup> This paragraph (containing a general canon of constitutional interpretation remarkable for flexibility in application, if not, rather, chargeable with vagueness) was afterwards introduced among the rules for such interpretation given in the second edition of Story's Comm. (§ 405, a.) Its insertion may suggest the existence of a doubt in the mind of the editor whether the rules given by the commentator in the first edition were broad enough to include the *judge's* practical interpretation in Prigg's case. See Judge Sutherland's observations on this passage, 9 Ohio, 270.

preventing them from intermeddling with, or obstructing, or abolishing the rights of the owners of slaves.<sup>1</sup>

"By the general law of nations, no nation is bound to recognize the state of slavery, as to foreign slaves found within its territorial dominions, when it is in opposition to its own policy and institutions, in favor of the subjects of other nations where slavery is recognized. If it does it, it is as a matter of comity, and not as a matter of international right. The state of slavery is deemed to be a mere municipal regulation, founded upon and limited to the range of the territorial laws. This was fully recognized in *Somerset's Case*, [612] *Lofft's Rep.* 1; *S. C.*, 11 *State Trials* by *Harg.* 340; *S. C.*, 20 *Howell's State Trials*, 79; which was decided before the American Revolution. It is manifest from this consideration, that if the Constitution had not contained this clause, every non-slaveholding State in the Union would have been at liberty to have declared free all runaway slaves coming within its limits, and to have given them entire immunity and protection against the claims of their masters; a course which would have created the most bitter animosities, and engendered perpetual strife between the different States. The clause was, therefore, of the last importance to the safety and security of the southern States; and could not have been surrendered by them without endangering their whole property in slaves. The clause was accordingly adopted into the Constitution by the unanimous consent of the framers of it; a proof at once of its intrinsic and practical necessity.

"How, then, are we to interpret the language of the clause? The true answer is, in such a manner, as, consistently with the words, shall fully and completely effectuate the whole objects of it. If by one mode of interpretation the right must become shadowy and unsubstantial, and without any remedial power adequate to the end, and by another mode it will attain its just end and secure its manifest purpose, it would seem, upon

<sup>1</sup> Like *Ch. J. Nelson*, in 12 *Wend.* 311 (*ante*, p. 447, note), Judge Story here speaks of the provision as intended to secure a legal right of the owner, while in the very next paragraph he admits that the right would not exist in the absence of the provision.



principles of reasoning absolutely irresistible, that the latter ought to prevail. No court of justice can be authorized so to construe any clause of the Constitution as to defeat its obvious ends, when another construction, equally accordant with the words and sense thereof, will enforce and protect them.

"The clause manifestly contemplates the existence of a positive, unqualified right on the part of the owner of the slave, which no State law or regulation can in any way qualify, regulate, control, or restrain. The slave is not to be discharged from service or labor, in consequence of any State law or regulation. Now, certainly, without indulging in any nicety of criticism upon words, it may fairly and reasonably be said, that any State law or State regulation, which interrupts, limits, delays, or postpones the right of the owner to the immediate possession of the slave, and the immediate command of his service and labor, operates, *pro tanto*, a discharge of the slave therefrom. The question can never be, how much the slave is discharged from; but whether he is [613] discharged from any, by the natural or necessary operation of State laws or State regulations. The question is not one of quantity or degree, but of withholding, or controlling the incidents of a positive and absolute right.

"We have said that the clause contains a positive and unqualified recognition of the right of the owner in the slave, unaffected by any State law or regulation whatsoever, because there is no qualification or restriction of it to be found therein; and we have no right to insert any which is not expressed, and cannot be fairly implied; especially are we estopped from so doing, when the clause puts the right to the service or labor upon the same ground and to the same extent in every other State as in the State from which the slave escaped, and in which he was held to the service or labor. If this be so, then all the incidents to that right attach also; the owner must, therefore, have the right to seize and repossess the slave, which the local laws of his own State confer upon him as property; and we all know that this right of seizure and recaption is universally acknowledged in all the slaveholding States. Indeed, this is no more than a mere affirmance of the principles of the



common law applicable to this very subject. Mr. Justice Blackstone (3 Bl. Comm. 4) lays it down as unquestionable doctrine. 'Recaption or reprisal (says he) is another species of remedy by the mere act of the party injured. This happens when any one hath deprived another of his property in goods or chattels personal, or wrongfully detains one's wife, child, or servant; in which case the owner of the goods, and the husband, parent, or master may lawfully claim and retake them, wherever he happens to find them, so it be not in a riotous manner, or attended with a breach of the peace.' Upon this ground we have not the slightest hesitation in holding, that, under and in virtue of the Constitution, the owner of a slave is clothed with entire authority, in every State in the Union, to seize and recapture his slave, whenever he can do it without any breach of the peace, or any illegal violence. In this sense and to this extent this clause of the Constitution may properly be said to execute itself; and to require no aid from legislation, State or national.

"But the clause of the Constitution does not stop here; nor, indeed, consistently with its professed objects, could it do so. Many [614] cases must arise in which, if the remedy of the owner were confined to the mere right of seizure and recaption, he would be utterly without any redress. He may not be able to lay his hands upon the slave. He may not be able to enforce his rights against persons who either secrete, or conceal, or withhold the slave. He may be restricted by local legislation as to the mode of proofs of his ownership; as to the courts in which he shall sue, and as to the actions which he may bring, or the process he may use to compel the delivery of the slave. Nay, the local legislation may be utterly inadequate to furnish the appropriate redress by authorizing no process in rem, or no specific mode of repossessing the slave, leaving the owner, at best, not that right which the Constitution designed to secure—a specific delivery and repossession of the slave, but a mere remedy in damages, and that perhaps against persons utterly insolvent or worthless. The State legislation may be entirely silent on the whole subject, and its ordinary remedial process framed with different views and objects; and this may be in-

nocently as well as designedly done, since every State is perfectly competent, and has the exclusive right to prescribe the remedies in its own judicial tribunals, to limit the time as well as the mode of redress, and to deny jurisdiction over cases which its own policy and its own institutions either prohibit or discountenance.

"If, therefore, the clause of the Constitution had stopped at the mere recognition of the right, without providing or contemplating any means by which it might be established and enforced in cases where it did not execute itself, it is plain that it would have, in a great variety of cases, a delusive and empty annunciation. If it did not contemplate any action either through State or national legislation, as auxiliaries to its more perfect enforcement in the form of remedy, or of protection, then, as there would be no duty on either to aid the right, it would be left to the mere comity of the States to act as they should please, and would depend for its security upon the changing course of public opinion, the mutations of public policy, and the general adaptations of remedies for purposes strictly according to the *lex fori*."

§ 749. In the portion of the Opinion above cited the provisions had been regarded as private law, creating perfect legal rights and obligations of private persons, in accordance with the fourth construction. But in that which follows, Judge Story begins to favor either the second or the third construction, by speaking of a duty of delivery correlative to the claimant's right:—

"And this leads us to the consideration of the other part of the clause, which implies at once a guaranty and duty. It says, 'But he (the slave) shall be delivered up on claim of the party to [615] whom such service or labor may be due.' Now, we think it exceedingly difficult, if not impracticable, to read this language and not to feel that it contemplated some farther remedial redress than that which might be administered at the hands of the owner himself. A claim is to be made. What is a claim? It is, in a just juridical sense, a demand of some matter as of right made by one person upon another, to do or to forbear to do some act or thing as a matter of duty. A more limited, but at the same time an equally expressive, definition



was given by Lord Dyer, as cited in *Stowell v. Zouch*, Plowden, 359; and it is equally applicable to the present case: that 'a claim is a challenge by a man of the propriety or ownership of a thing, which he has not in possession, but which is wrongfully detained from him.' The slave is to be delivered up on the claim. By whom to be delivered up? In what mode to be delivered up? How, if a refusal takes place, is the right of delivery to be enforced? Upon what proofs? What shall be the evidence of a rightful recaption or delivery? When, and under what circumstances, shall the possession of the owner, after it is obtained, be conclusive of his right, so as to preclude any further inquiry or examination into it by local tribunals or otherwise, while the slave, in possession of the owner, is in transitu to the State from which he fled?

"These, and many other questions, will readily occur upon the slightest attention to the clause; and it is obvious that they can receive but one satisfactory answer. They require the aid of legislation to protect the right, to enforce the delivery, and to secure the subsequent possession of the slave. If, indeed, the Constitution guarantees the right, and if it requires the delivery upon the claim of the owner, (as cannot well be doubted), the natural inference certainly is, that the national government is clothed with the appropriate authority and functions to enforce it. The fundamental principle applicable to all cases of this sort would seem to be, that where the end is required the means are given; and where the duty is enjoined, the ability to perform it is contemplated to exist on the part of the functionaries to whom it is entrusted. The clause is found in the national Constitution, and not in that of any State. It does not point out any State functionaries, or any State action to carry its provisions into effect. The States cannot, therefore, be compelled to enforce them; and [616] it might well be deemed an unconstitutional exercise of the power of interpretation to insist that the States are bound to provide means to carry into effect the duties of the national government, nowhere delegated or intrusted to them by the Constitution. On the contrary, the natural, if not the necessary con-



clusion is, that the national government, in the absence of all positive provisions to the contrary, is bound, through its own proper departments, legislative, judicial, or executive, as the case may require, to carry into effect all the rights and duties imposed upon it by the Constitution. The remark of Mr. Madison, in the *Federalist* (No. 43), would seem in such cases to apply with peculiar force. 'A right (says he) implies a remedy; and where else would the remedy be deposited than where it is deposited by the Constitution?' meaning, as the context shows, in the government of the United States."

§ 750. It will be noticed that in the paragraph last quoted the judge does not designate the person on whom the Constitution has imposed the duty of delivery. By his inferring that "the national Government is clothed with appropriate authority and functions to enforce it," i. e., the delivery, it would seem that he supposed that the duty was imposed on some person other than that national Government. But after saying that "the States cannot be compelled to enforce them," i. e., the provisions of the clause, he argues that the States cannot be held "bound to provide means to carry into effect the duties of the national Government;" that "the Government is bound, through its own proper departments, to carry into effect all the rights and *duties imposed upon it* by the Constitution."

That Judge Story here conceived of the duty imposed as a duty of the national Government correlative to the claimant's right, and not a duty of the several State correlative to the owner's right, which duty and right the national Government was bound to enforce and maintain, appears from the next paragraph, which seems to be the key-stone of the whole Opinion:—

"It is plain, then, that where a claim is made by the owner, out of possession, for the delivery of a slave, it must be made, if at all, against some other person; and inasmuch as the right is a right of property capable of being recognized and asserted by proceedings before a Court of justice, between parties adverse to each other, it constitutes, in the strictest sense, a controversy between the parties, and a case 'arising under the Constitution' of the United States; within the express dele-

gation of judicial power given by that instrument. Congress, then, may call that power into activity for the very purpose of giving effect to that right; and if so, then it may prescribe the mode and extent in which it shall be applied, and how, and under what circumstances the proceedings shall afford a complete protection and guaranty to the right."<sup>1</sup>

Judge Story does not here indicate this "other person," who, with the claimant-owner, is one of the "parties adverse to each other," in "a controversy between the parties, or in a case 'arising under the Constitution' of the United States within the express delegation of judicial power given by that instrument." But since he had, in the preceding paragraph, attributed the duty of delivery either to the State in which the fugitive is found, or to the national Government, he must have found this "other person" in one of these two.

It is possible that Judge Story may have thought that this controversy or case under the Constitution would not be a *suit* either in law or equity. But it seems very unlikely that he should have taken no notice of the thirteenth Amendment,<sup>2</sup> in this connection, if he had supposed a State of the United States to be the party defendant in this case or controversy. It might, from this alone, be inferred that Judge Story did not discover this "other person" in a State of the United States.<sup>3</sup>

<sup>1</sup> In *James Scott's case*, 1851, Judge Sprague, of the U. S. Dist. Court for Massachusetts, said, IV. Monthly Law R. p. 160:—"The remark made in the Opinion delivered in *Prigg v. Pennsylvania*, that a claim for a fugitive from labor was within the judicial power, was an *obiter dictum*, and can be reconciled with what was deliberately decided in the same case only by supposing that the judge who delivered the Opinion intended that Congress might legislate for it as within the judicial power, and provide for its being tried by a court, not that they must do so." If this was *obiter dictum* in the sense of being immaterial to the question actually before the court, so was that which Judge Sprague refers to as having been deliberately decided by it. For the constitutionality of the Act of Congress was not in question. If he calls it *obiter dictum* in the sense of not being reconcilable with other parts of the Opinion, that may be true, but it is no proof of its being less reasonable or correct. If inconsistent, it invalidates the reasoning of the whole Opinion and its juridical authority. But, so far from being *obiter dictum*, this passage is the key to the whole argument of Judge Story.

<sup>2</sup> In which amendment it is declared:—"The judicial power of the United States shall not be construed to extend to any suit in law or equity commenced or prosecuted against one of the United States, by citizens of another State, or by citizens or subjects of any foreign state."

<sup>3</sup> It is very plain that Judge Story adopted, as the basis of his Opinion, the argument of Mr. Meredith, counsel in this case for the State of Maryland (*Sutcliffe, J.*, 9 Ohio, 270). Mr. Meredith had based the power of Congress on the idea that



§ 751. Judge Story then declares that this theory had been adopted by Congress.

"Congress has taken this very view of the power and duty of the national government. As early as the year 1791, the attention of Congress was drawn to it (as we shall hereafter more fully see) in consequence of some practical difficulties arising under the other clause, respecting fugitives from justice escaping into other States. The result of their deliberations was the passage of the act of the 12th of February, 1793, ch. 51 (7), which," &c.

The judge here gives an abstract of the statute, and then, on page 617 of the report, says:—

"In a general sense, this act may be truly said to cover the whole ground of the Constitution, both as to fugitives from justice and fugitive slaves; that is, it covers both the subjects, in its enactments; not because it exhausts the remedies which may be applied by Congress to enforce the rights, if the provisions of the act shall, in practice, be found not to attain the object of the Constitution; but because it points out fully all the modes of attaining those objects, which Congress, in their discretion, have as yet deemed expedient or proper to meet the exigencies of the Constitution. If this be so, then it would seem, upon just principles of construction, that the legislation of Congress, if constitutional, must supersede all State legislation upon the same subject; and, by necessary implication, prohibit it. For if Congress have a constitutional power to regulate a particular subject, and they do actually regulate it in a given manner, and in a certain form, it cannot [618] be that the State legislatures have a right to interfere; and, as it were, by way of complement to the legislation of Congress, to prescribe additional regulations, and what they may deem auxiliary provisions for the same purpose. In such a case, the legislation of Congress, in what it does prescribe, manifestly indicates that it does not intend that there shall be any farther legislation to

a case, within the judicial power, arises under the provision (16 Peters, 568). But it does not appear that he regarded the national Government as the party against whom the claim is to be made. That idea may have been original with Judge Story.



act upon the subject-matter. Its silence as to what it does not do, is as expressive of what its intention is as the direct provisions made by it. This doctrine was fully recognized by this Court, in the case of *Houston v. Moore*, 5 Wheat. Rep. 1, 21, 22; where it was expressly held, that where Congress have exercised a power over a particular subject given them by the Constitution, it is not competent for State legislation to add to the provisions of Congress upon that subject; for that the will of Congress upon the whole subject is as clearly established by what it had not declared, as by what it has expressed.

“But it has been argued, that the act of Congress is unconstitutional, because it does not fall within the scope of any of the enumerated powers of legislation confided to that body; and therefore it is void. Stripped of its artificial and technical structure, the argument comes to this, that although rights are exclusively secured by, or duties are exclusively imposed upon, the national government, yet, unless the power to enforce these rights, or to execute these duties, can be found among the express powers of legislation enumerated in the Constitution, they remain without any means of giving them effect by any act of Congress; and they must operate solely *proprio vigore*, however defective may be their operation; nay, even although, in a practical sense, they may become a nullity from the want of a proper remedy to enforce them, or to provide against their violation. If this be the true interpretation of the Constitution, it must, in a great measure, fail to attain many of its avowed and positive objects as a security of rights, and a recognition of duties. Such a limited construction of the Constitution has never yet been adopted as correct, either in theory or practice. No one has ever supposed that Congress could, constitutionally, by its legislation, exercise powers, or enact laws beyond the powers delegated to it by the Constitution; but it has, on various occasions, exercised powers which were necessary and proper as means to carry into effect rights expressly [619] given, and duties expressly enjoined thereby. The end being required, it has been deemed a just and neces-

sary implication, that the means to accomplish it are given also; or, in other words, that the power flows as a necessary means to accomplish the end.

"Thus, for example, although the Constitution has declared that representatives shall be apportioned among the States according to their respective federal numbers; and, for this purpose, it has expressly authorized Congress, by law, to provide for an enumeration of the population every ten years; yet the power to apportion representatives, after this enumeration is made, is nowhere found among the express powers given to Congress, but it has always been acted upon as irresistibly flowing from the duty positively enjoined by the Constitution. Treaties made between the United States and foreign powers often contain special provisions, which do not execute themselves, but require the interposition of Congress to carry them into effect, and Congress has constantly, in such cases, legislated on the subject; yet, although the power is given to the executive, with the consent of the senate, to make treaties, the power is nowhere in positive terms conferred upon Congress to make laws to carry the stipulations of treaties into effect. It has been supposed to result from the duty of the national government to fulfill all the obligations of treaties. The senators and representatives in Congress are, in all cases, except treason, felony, and breach of the peace, exempted from arrest during their attendance at the sessions thereof, and in going to and returning from the same. May not Congress enforce this right by authorizing a writ of habeas corpus, to free them from an illegal arrest in violation of this clause of the Constitution? If it may not, then the specific remedy to enforce it must exclusively depend upon the local legislation of the States; and may be granted or refused according to their own varying policy, or pleasure. The Constitution also declares that the privilege of the writ of habeas corpus shall not be suspended, unless, when in cases of rebellion or invasion, the public safety may require it. No express power is given to Congress to secure this invaluable right in the non-enumerated cases, or to suspend the writ in cases of rebellion or invasion. And yet it would be difficult to say, since this great writ of liberty is



usually provided for by the ordinary functions of legislation, and can be effectually [620] provided for only in this way, that it ought not to be deemed by necessary implication within the scope of the legislative power of Congress.

"These cases are put merely by way of illustration, to show that the rule of interpretation, insisted upon at the argument, is quite too narrow to provide for the ordinary exigencies of the national government, in cases where rights are intended to be absolutely secured, and duties are positively enjoined by the Constitution."

In this portion of the Opinion, the idea seems to prevail that the provision acts on the national Government, not on the several State, creating a duty of that Government. For here, as he does more at length in the sequel, Judge Story denies to the several States all power to act in the premises; a denial hardly consistent with the idea that the Constitution is constantly requiring from them the performance of a duty in this matter. So Judge Story speaks again, on page 618, of "duties exclusively imposed upon the national Government," and of the power "to execute these duties."

§ 752. Judge Story, on page 620 of the Report, proceeds to say:—

"The very act of 1793, now under consideration, affords the most conclusive proof that Congress has acted upon a very different rule of interpretation, and has supposed that the right as well as the duty of legislation on the subject of fugitives from justice, and fugitive slaves, was within the scope of the constitutional authority conferred on the national legislature. In respect to fugitives from justice, the Constitution, although it expressly provides that the demand shall be made by the executive authority of the State from which the fugitive has fled, is silent as to the party upon whom the demand is to be made, and as to the mode in which it shall be made. This very silence occasioned embarrassments in enforcing the right and duty at an early period after the adoption of the Constitution; and produced a hesitation on the part of the executive authority of Virginia to deliver up a fugitive from justice, upon the demand of the executive of Pennsylvania, in the



year 1791; and as we historically know from the message of President Washington and the public documents of that period, it was the immediate cause of the passing of the act of 1793, which designated the person (the State executive) upon whom the demand should be made, and the mode and proofs upon and in which it should be made. From that time down to the present hour, not a doubt has been breathed upon the constitutionality of this part of the act; and every executive in the Union has constantly acted upon and admitted its validity. Yet the right and the duty are dependent, as to their mode of execution, solely on the act of Congress; and but for that, they would remain a nominal right and passive duty; the execution of which being intrusted to and required of no one in particular, all persons might be at liberty to disregard it. This very acquiescence, under such circumstances, of the highest State functionaries, is a most decisive proof of the universality of the opinion that the [621] act is founded in a just construction of the Constitution; independent of the vast influence which it ought to have as a contemporaneous exposition of the provisions, by those who were its immediate framers, or intimately connected with its adoption.

“The same uniformity of acquiescence in the validity of the act of 1793, upon the other part of the subject-matter, that of fugitive slaves, has prevailed throughout the whole Union until a comparatively recent period. Nay; being from its nature and character more readily susceptible of being brought into controversy, in courts of justice, than the former, and of enlisting in opposition to it the feelings, and it may be the prejudices of some portions of the non-slaveholding States; it has naturally been brought under adjudication in several States in the Union, and particularly in Massachusetts, New York, and Pennsylvania, and on all these occasions its validity has been affirmed. The cases cited at the bar, of *Wright v. Deacon*, 5 Serg. and Rawle, 62; *Glen v. Hodges*, 9 Johns. Rep. 67; *Jack v. Martin*, 12 Wend. Rep. 311; *S. C.*, 14 Wend. Rep. 507; and *Com. v. Griffin*, 2 Pick. Rep. 11; are directly in point. So far as the judges of the courts of the United States have been called upon to enforce it, and to grant the certificate required by it,

it is believed that it has been uniformly recognized as a binding and valid law, and as imposing a constitutional duty. Under such circumstances, if the question were one of doubtful construction, such long acquiescence in it, such contemporaneous expositions of it, and such extensive and uniform recognition of its validity, would, in our judgment entitle the question to be considered at rest, unless, indeed, the interpretation of the Constitution is to be delivered over to interminable doubt throughout the whole progress of legislation, and of national operations. Congress, the executive, and the judiciary have upon various occasions acted upon this as a sound and reasonable doctrine. Especially did this Court in the cases of *Stuart v. Laird*, 1 Cranch Rep. 299; and *Martin v. Hunter*, 1 Wheat. Rep. 304; and in *Cohen v. The Commonwealth of Virginia*, 6 Wheat. Rep. 264: rely upon contemporaneous expositions of the Constitution, and long acquiescence in it with great confidence, in the discussion of questions of a highly interesting and important nature.

"But we do not wish to rest our present opinion upon the ground [622] either of contemporaneous exposition, or long acquiescence, or even practical action; neither do we mean to admit the question to be of a doubtful nature, and therefore as properly calling for the aid of such considerations. On the contrary, our judgment would be the same if the question were entirely new, and the act of Congress were of recent enactment. We hold the act to be clearly constitutional in all its leading provisions, and, indeed, with the exception of that part which confers authority upon State magistrates, to be free from reasonable doubt and difficulty upon the grounds already stated. As to the authority so conferred upon State magistrates, while a difference of opinion has existed, and may exist still on the point, in different States, whether State magistrates are bound to act under it; none is entertained by this Court that State magistrates may, if they choose, exercise that authority, unless prohibited by State legislation."

§ 753. The residue of the Opinion is occupied with a question which is to be considered in a later portion of this treatise. But it is given here because it contains some passages which



indicate Judge Story's idea of the "nature of the power" in Congress, and "the true objects to be attained by it."

"The remaining question is, whether the power of legislation upon this subject is exclusive in the national government, or concurrent in the States, until it is exercised by Congress. In our opinion it is exclusive; and we shall now proceed briefly to state our reasons for that opinion. The doctrine stated by this Court, in *Sturgis v. Crowninshield*, 4 Wheat. Rep. 122, 193, contains the true, although not the sole rule or consideration, which is applicable to this particular subject. 'Wherever,' said Mr. Chief Justice Marshall, in delivering the opinion of the Court, 'the terms in which a power is granted to Congress, or the nature of the power require that it should be exercised exclusively by Congress, the subject is as completely taken from the State legislatures as if they had been forbidden to act.' The nature of the power, and the true objects to be attained by it, are then as important to be weighed, in considering the question of its exclusiveness, as the words in which it is granted.

"In the first place, it is material to state (what has been already incidentally hinted at), that the right to seize and retake fugitive slaves, and the duty to deliver them up, in whatever State of the Union they may be found, and of course the corresponding power in Congress to use the appropriate means to enforce the right and duty, derive their whole validity and obligation exclusively from the Constitution of the United States; and are there, for the first time, recognized and established in that peculiar character. [623] Before the adoption of the Constitution, no State had any power whatsoever over the subject, except within its own territorial limits, and could not bind the sovereignty or the legislation of other States. Whenever the right was acknowledged or the duty enforced in any State, it was as a matter of comity and favor, and not as a matter of strict moral, political, or international obligation or duty. Under the Constitution it is recognized as an absolute, positive, right and duty, pervading the whole Union with an equal and supreme force, uncontrolled and uncontrollable by State sovereignty or State legislation. It is, therefore, in a just sense



a new and positive right, independent of comity, confined to no territorial limits, and bounded by no State institutions or policy. The natural inference deducible from this consideration certainly is, in the absence of any positive delegation of power to the State legislatures, that it belongs to the legislative department of the national government, to which it owes its origin and establishment.<sup>1</sup> It would be a strange anomaly and forced construction to suppose that the national government meant to rely for the due fulfillment of its own proper duties and the rights which it intended to secure, upon State legislation, and not upon that of the Union. A fortiori, it would be more objectionable to suppose that a power which was to be the same throughout the Union should be confided to State sovereignty, which could not rightfully act beyond its own territorial limits.

"In the next place, the nature of the provision and the objects to be attained by it, require that it should be controlled by one and the same will, and act uniformly by the same system of regulations throughout the Union. If, then, the States have a right, in the absence of legislation by Congress, to act upon the subject, each State is at liberty to prescribe just such regulations as suit its own policy, local convenience, and local feelings. The legislation of one State may not only be different from, but utterly repugnant to and incompatible with that of another. The time, and mode, and limitation of the remedy; the proofs of the title, and all other incidents applicable thereto, may be prescribed in one State, which are rejected or disclaimed in another. One State may require the owner to sue in one mode, another in a different mode. One State may make a statute of limitations as to the remedy, in its own tribunals, short and summary; another [624] may prolong the period, and yet restrict the proofs; nay, some States may utterly refuse to act upon the subject at all; and others may refuse to open its Courts

<sup>1</sup> What is this "it" which owes its existence to the national Government? Apparently, the antecedent is the "new and positive right" which is "recognized under the Constitution." But did Judge Story mean to say that this new and positive right "owes its origin and establishment" to the national Government? Does the Constitution owe its origin and establishment to the national Government?

to any remedies in rem, because they would interfere with their own domestic policy, institutions, or habits. The right, therefore, would never, in a practical sense, be the same in all the States. It would have no unity of purpose, or uniformity of operation. The duty might be enforced in some States; retarded or limited in others; and denied as compulsory in many, if not in all. Consequences like these must have been foreseen as very likely to occur in the non-slaveholding States, where legislation, if not silent on the subject, and purely voluntary, could scarcely be presumed to be favorable to the exercise of the rights of the owner.

“It is scarcely conceivable that the slaveholding States would have been satisfied with leaving to the legislation of the non-slaveholding States a power of regulation, in the absence of that of Congress, which would or might practically amount to a power to destroy the rights of the owner. If the argument, therefore, of a concurrent power in the States to act upon the subject-matter in the absence of legislation by Congress, be well founded; then, if Congress had never acted at all; or if the act of Congress should be repealed without providing a substitute, there would be a resulting authority in each of the States to regulate the whole subject at its pleasure; and to dole out its own remedial justice, or withhold it at its pleasure, and according to its own views of policy and expediency. Surely such a state of things never could have been intended, under such a solemn guarantee of right and duty. On the other hand, construe the right of legislation as exclusive in Congress, and every evil and every danger vanishes. The right and the duty are then co-extensive and uniform in remedy and operation throughout the whole Union. The owner has the same security, and the same remedial justice, and the same exemption from State regulation and control, through however many States he may pass with his fugitive slave in his possession, in transitu, to his own domicile. But, upon the other supposition, the moment he passes the State line he becomes amenable to the laws of another sovereignty, whose regulations may greatly embarrass or delay the exercise of his rights; and even be repugnant to those of the State where he first arrested



the fugitive. Consequences like these show that [625] the nature and objects of the provision imperiously require, that, to make it effectual, it should be construed to be exclusive of State authority. We adopt the language of this Court in *Sturgis v. Crownshield*, 4 Wheat. Rep. 193, and say, that 'it has never been supposed that the concurrent power of legislation extended to every possible case in which its exercise by the States has not been expressly prohibited. The confusion of such a practice would be endless.' And we know no case in which the confusion and public inconvenience and mischiefs thereof could be more completely exemplified than the present.

"These are some of the reasons, but by no means all, upon which we hold the power of legislation on this subject to be exclusive in Congress.<sup>1</sup> To guard, however, against any possible misconstruction of our views, it is proper to state that we are by no means to be understood in any manner whatsoever to doubt or to interfere with the police power belonging to the States in virtue of their general sovereignty. That police power extends over all subjects within the territorial limits of the States, and has never been conceded to the United States. It is wholly distinguishable from the right and duty secured by the provision now under consideration, which is exclusively derived from and secured by the Constitution of the United States, and owes its whole efficacy thereto. We entertain no doubt whatsoever that the States, in virtue of their general police power, possess full jurisdiction to arrest and restrain runaway slaves, and remove them from their borders, and otherwise to secure themselves against their depredations and evil example, as they certainly may do in cases of idlers, vagabonds, and paupers. The rights of the owners of fugitive slaves are in no just sense interfered with, or regulated by such a course; and in many cases the operations of this police power, although designed essentially for other purposes, for the pro-

<sup>1</sup> It is very remarkable that "in all his extensive writings upon the Constitution Judge Story had never, either in the text, note, or index, even intimated that he supposed the States had ever delegated, or the federal Government acquired, any power to legislate for the rendition of fugitives from service." *Sutliff, J.*, 9 Ohio, 274; and see *ante*, p. 461, note.



tection, safety, and peace of the State, may essentially promote and aid the interests of the owners. But such regulations can never be permitted to interfere with or to obstruct the just rights of the owner to reclaim his slave, derived from the Constitution of the United States, or with the remedies prescribed by Congress to aid and enforce the same."

This argument against the concurrent legislation of the States seems best to accord with the second construction of the constitutional provision. In substance this reasoning appears to be, that since the rule in the Constitution must be maintained by the national Government, in order that the rights which it guarantees may not depend on the several wills of States who are the subjects of the rule, it would be inconsistent to allow the States to share in the maintenance of those rights, even though the duty correlative to those rights is the duty of the several State, and though the obligation of the States to fulfill this duty is made the foundation of the power attributed to the national Government.<sup>1</sup>

If Judge Story had adhered to the idea that the clause imposed the duty of delivery upon the national Government, the argument against State legislation would have been much more simple. For it could hardly be pretended that the States should prescribe in what manner the national Government should perform its duties under the Constitution.

Judge Story proceeded to say, in concluding:—

"Upon these grounds, we are of opinion that the act of Pennsylvania upon which this indictment is founded is unconstitutional [626] and void. It purports to punish as a public offence against that State the very act of seizing and removing a slave by his master, which the Constitution of the United States was designed to justify and uphold. The special verdict finds this fact, and the State Courts have rendered judgment against the plaintiff in error upon that verdict. That judgment must, therefore, be reversed, and the cause remanded

<sup>1</sup> In supposing that the provision creates a duty for the States, and at the same time forbids their fulfilling it, there is an inconsistency which could not have escaped Judge Story. Perhaps it was the perception of this that led to his speaking, on p. 611, of the right of the owner as something which had a legal existence, as against the State, before the Constitution.

to the Supreme Court of Pennsylvania, with directions to carry into effect the judgment of this Court rendered upon the special verdict in favor of the plaintiff in error."

§ 754. There is some room to question whether Judge Story, throughout the whole of this Opinion, distinguished, in his own mind, the two theories for the legislation of Congress, one of which requires the second and the other the third or the fourth construction; whether he always recognized the power which was to be carried into effect by that legislation as an *implied* power in the national Government, to enforce a law binding the States as its subjects (the second construction), or as a power within the *express* judicial power of the United States in cases arising, under a law contained in the Constitution, between the private claimant, on the one hand, and the States or the national Government on the other (the third construction), or between the private claimant and the fugitive himself (according to the fourth construction). But his language on page 616 of the report will accord only with the doctrine included in the third construction. That theory is the only one which can be reconciled with all parts of his Opinion; and from his denial of legislative power in the States, as well as by inferences from the thirteenth Amendment, it is most reasonable to suppose that he regarded the case or controversy, thus within the judicial power, as one arising between the claimant owner and the national Government.

§ 755. It is doubtful whether even any one of Judge Story's associates agreed with him in his theory for the legislative power of Congress. In the judgment delivered in this case, all the members of the court then present, Chief Justice Taney, Justices Story, Thompson, Baldwin, Wayne, Daniel, and McLean, concurred. But the "Opinion of the Court" was in fact the Opinion of Justices Story and Wayne only. The other justices disagreed more or less with the principles advanced in it.<sup>1</sup> In seeking for authority on the question of con-

<sup>1</sup> 16 Peters, 649, Judge Wayne says:—"Not a point has been decided in the cause now before this Court which has not been ruled in the courts of Massachusetts, New York, and Pennsylvania, and in other State courts. Judges have differed as to some of them, but the courts of the States have announced all of them with the consideration and solemnity of judicial conclusion. In cases, too, in



struction and of the power of Congress, the Opinion of each member of the court must be separately examined. With the exception of Judge Baldwin, the judges delivered Opinions severally; though at such length that they cannot be here inserted in full.

§ 756. Mr. Justice Wayne said, 16 Peters, 636 :—"I concur altogether in the Opinion of the Court as it has been given by my brother Story;" and of the remainder of his several Opinion (*ib.* 636-650), says (*ib.* 638):—"My object, and the only object which I have in view, in what I am about to say, is, to establish the position that Congress has the exclusive right to legislate upon this provision of the Constitution. I shall endeavor to prove it by the condition of the States when the Constitution was formed; by references to the provision itself; and to the Constitution generally.

"Let it be remembered, that the conventioners who formed the Constitution, were the representatives of equal sovereignties. That they were assembled to form a more perfect union than then existed between the States under the confederacy. That they co-operated to the same end; but that they were divided into two parties, having antagonist interests in respect to slavery.

"One of these parties, consisting of several States, required as a condition, upon which any constitution should be presented to the States for ratification, a full and perfect security for their slaves as property, when they fled into any of the States of the Union. The fact is not more plainly stated by me than it was put in the convention. The representatives from the non-slaveholding States assented to the condition."

which the decisions were appropriate because the points were raised by the record." This statement is surely liable to some exception. In no previous case was it asserted that the claimant might seize and remove the alleged fugitive without regard either to the law or Congress, or the local law of the State forum; not even by Judge Baldwin in *Johnson v. Tompkins*, for there the question appears to have been regarded as solely determinable by the law of the State. *Ante*, § 742.

<sup>1</sup> While indicating his adherence to the theory that the Constitution is a federal compact between the States, and not the act of the integral people of the United States, Judge Wayne distinguishes this provision as the federative act of two parties—the slaveholding and the non-slaveholding States (of that time, or those which should be such at the date of Prigg's case?). With as much propriety it might be said that the constituent parties were the States having western



On p. 641, Judge Wayne speaks of "the rights and obligations of the States under the provision," and says:—"It is admitted, that the provision raises what is properly termed a perfect obligation upon all of the States to abstain from doing anything which may interfere with the rights secured. Will this be so, if any part of what may be necessary to discharge the obligation is reserved by each State, to be done as each may think proper? The obligation is common to all of them, to the same extent. Its object is to secure the property of some of the States, and the individual rights of their citizens in that property. Shall, then, each State be permitted to legislate in its own way, according to its own judgment, and their separate notions, in what manner the obligation shall be discharged to those States to which it is due? To permit some of the States to say to the others, how the property included in the provision was to be secured by legislation, without the assent of the latter, would certainly be, to destroy the equality and force of the guarantee, and the equality of the States by which it was made. That was [642] not anticipated by the representatives of the slaveholding States in the convention, nor could it have been intended by the framers of the Constitution.

"Is it not more reasonable to infer, as the States were forming a government for themselves, to the extent of the powers conceded in the Constitution, to which legislative power was given to make all laws necessary and proper to carry into execution all powers vested in it—that they meant that the right for which some of the States stipulated, and to which all acceded, should, from the peculiar nature of the property in which only some of the States were interested—be carried into execution by that department of the general government in which they were all to be represented, the Congress of the United States.

"But is not this power of legislation by the States, upon

lands and the States not having any, or the States which were to be principally enriched by agriculture and the States which were to be enriched by manufactures. The rights and obligations which correspond to such sectional divisions are only determined by political adjustments. Can the rights and obligations of private persons be judicially determined by such distinctions? Compare *ante*, §§ 504, 505, on the doctrine of equality of the States in respect to the Territories.

his provision, a claim for each to use its discretion in interpreting the manner in which the guarantee shall be fulfilled?"

From the whole, it appears that while Judge Wayne maintained that the fugitive might be seized and removed under the provision alone, operating as private law, he also regarded the State in its political capacity as owing a duty under a law which Congress was bound to enforce, and in this adopted the second construction. Or, if he adopted any other construction, he regarded the several State as that "other person" upon whom the duty to deliver up is enjoined, and who, with the claimant, is a party in a case within the judicial power of the United States. It is also remarkable that Judge Wayne regards the State from which the fugitive escaped as the subject of the right correlative to this duty. See pages 644-646 of the report.

§ 757. Chief Justice Taney, in the beginning of his several Opinion, p. 626, says:—"But as the questions before us arise upon the construction of the Constitution of the United States, and as I do not assent to all the principles contained in the opinion just delivered, it is proper to state the points on which I differ." Judge Taney supports the fourth construction by affirming the owner's right to seize and remove the fugitive independently of statute regulations, and also by basing the power of Congress on the general power of maintaining whatever rights of private persons may exist under national law. On the same page his words are:—"I concur also in all that is contained in the opinion concerning the power of Congress to protect the citizens of the slaveholding States in the enjoyment of this right; and to provide by law an effectual remedy to enforce it and to inflict penalties upon those who shall violate its provisions; and no State is authorized to pass any law that comes in conflict in any respect with the remedy provided by Congress." In his argument in favor of concurrent action, judicial as well as legislative, on the part of the States, Judge Taney indicates his adoption of the same construction; particularly on page 628, where he says:—"Moreover, the clause of the Constitution of which we are speaking does not purport to be a distribution of the rights of sovereignty by which certain



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enumerated powers of government and legislation are confided to the United States. It does not deal with that subject. It provides merely for the rights of individual citizens of different States and places them under the protection of the general government; in order more effectually to guard them from invasion by the States. There are other clauses in the Constitution in which other individual rights are provided for and secured in the like manner; and it has never been suggested that the States could not uphold and maintain them, because they were guaranteed by the Constitution of the United States. \* \* For example, the Constitution provides that no State shall pass any law impairing the obligation of contracts. This, like the right in question, is an individual right placed under the protection of the general government,<sup>1</sup> and in order to secure it Congress has passed a law authorizing a writ of error to the Supreme Court," &c.

Judge Taney's argument seems, briefly, to be this, that—since the rights and obligations created by the provision are incident to relations of private persons under a law of national extent, the States must have the power to enforce that law as a rule of action for private persons within the several jurisdiction of the State.

§ 758. Mr. Justice Thompson said, p. 633:—"I concur in the judgment given by the court in this case. But not being able to yield my assent to all the doctrines embraced in the opinion, I will very briefly state the grounds on which my judgment is placed." Judge Thompson does not distinctly affirm the right of seizure and removal independently of the provisions of any statute (which doctrine was, however, necessarily implied in the judgment of the court), and says, p. 635:—"If, as seems to be admitted, legislation is necessary to carry into effect the object of the Constitution, what becomes of the right where there is no law on the subject?" Yet he also says, p. 634, "The right of the master to the service of the slave according to the laws of the State from which he escaped, is a

<sup>1</sup> It would be more correct to say that such rights rest on the national municipal law, which is to be maintained by the general Government as well as by the State Governments. On the same page, Judge Taney repeatedly uses the term, "individual right," meaning, apparently, the right of a private person.



right secured by the Constitution, and requires no law to fortify or strengthen it." He agrees with the Chief Justice in maintaining a concurrent power of legislation in the States, though, on the whole, his language is more in accordance with the third construction than with any other.

§ 759. Mr. Justice McLean disagreed with all the other members of the court by holding that the owner could not seize and remove the fugitive slave by virtue of the provision alone (pp. 666-673). It does not, however, follow from this alone that he could not have regarded the provision as having the effect of private law, according to the fourth construction. He seems to admit that independently of any statute the owner may have a perfectly legal right which may be judicially recognized (p. 670):—"I cannot perceive how any one can doubt that the remedy given in the Constitution, if, indeed, it give any remedy without legislation, was designed to be a peaceful one; a remedy sanctioned by judicial authority; a remedy guarded by the forms of law.<sup>1</sup> But the inquiry is reiterated—Is not the master entitled to his property? I answer, that he is. His right is guaranteed by the Constitution, and the most summary means for its enforcement is found in the acts of Congress."

Judge McLean's several Opinion contains but little explanatory of the basis of the legislative power of Congress. He treats the question of power in Congress as settled, and first refers to it by asking whether it is exclusive. On page 660:—"Does the provision in regard to the reclamation of fugitive slaves vest the power exclusively in the federal Government?" His language in arguing that the power is exclusive of State legislation would indicate his adoption of the second construction. It will be seen that Judge McLean constantly speaks of a duty of the States to deliver up the fugitive on claim, even while he asserts that they have no power to act in the matter. He continues:—"This must be determined from the language of the Constitution and the nature of the power. The language of the provision is general. It covers the whole ground, not in detail, but in principle. The States are inhibited from pass-

<sup>1</sup> Compare Chancellor Walworth's doctrine, *ante*, p. 451.

ing 'any law or regulation which shall discharge a fugitive slave from the service of his master;' and a positive duty is enjoined on them to deliver him up, 'on claim of the party to whom his service may be due.'

"The nature of the power shows that it must be exclusive." It was designed to protect the rights of the master, and against whom? Not against the State, nor the people of the State in which he resides; but against the people and the legislative action of other States where the fugitive from labor might be found. Under the confederation, the master had no legal means of enforcing his rights in a State opposed to slavery. A disregard of rights thus asserted was deeply felt in the South. It produced great excitement, and would have led to results destructive of the Union. To avoid this, the constitutional guarantee was essential.

"The necessity for this provision was found in the views and feelings of the people of the States opposed to slavery; and who, under such an influence, could not be expected favorably to regard the rights of the master. Now, by whom is this paramount law to be executed?"

"It is contended that the power to execute it rests with the States. The law was designed to protect the rights of the slaveholder against the States opposed to those rights;" and yet, by this argument, the effective power is in the hands of those on whom it is to operate.

"This would produce a strange anomaly in the history of legislation. It would show an inexperience and folly in the venerable framers of the Constitution, from which, of all public bodies that ever assembled, they were, perhaps, most exempt.

"The clause of the Constitution under consideration declares that no fugitive from labor shall be discharged from such labor, by any law or regulation of the State into which he may have fled. Is the State to judge of this? Is it left for the State to determine what effect shall be given to this and other parts of the provision?"

<sup>1</sup> Compare 9 Ohio, 269, Sutliff, J.

<sup>2</sup> Compare *ante*, p. 462, note.



"This power is not susceptible of division. It is a part of the fundamental law, and pervades the Union. The rule of action which it prescribes was intended to be the same in all the States. This is essential to the attainment of the objects of the [662] law. If the effect of it depended, in any degree, upon the construction of a State by legislation or otherwise, its spirit, if not its letter, would be disregarded. This would not proceed from any settled determination in any State to violate the fundamental rule, but from habits and modes of reasoning on the subject. Such is the diversity of human judgment, that opposite conclusions, equally honest, are often drawn from the same premises. It is, therefore, essential to the uniform efficacy of this constitutional provision that it should be considered, exclusively, a federal power. It is in its nature as much so as the power to regulate commerce, or that of foreign intercourse."

In the further examination of this question, Judge McLean, even while denying that the States would have any legislative power over the subject even had Congress not legislated, maintains the idea that the duty created by the clause is the duty of the States. In that part of his Opinion which relates to the validity of the Act of Congress in imposing duties on State magistrates, on page 665, he says:—

"The Constitution requires 'that such person shall be delivered up, on claim of the party to whom the service is due.' Here is a positive duty imposed; and Congress have said in what mode this duty shall be performed. Had they not the power to do so? If the Constitution was designed, in this respect, to require, not a negative but a positive duty on the State, and the people of the State, where the fugitive from labor may be found—of which, it would seem, there can be no doubt—it must be equally clear that Congress may prescribe in what manner the claim and surrender shall be made. I am therefore brought to the conclusion that, although, as a general principle, Congress cannot impose duties on State officers, yet in the cases of fugitives from labor and from justice, they have the power to do so.

"In the case of *Martin's Lessee v. Hunter*, 1 Wheat. Rep.

304, this Court say, 'The language of the Constitution is imperative on the States as to the performance of many duties. It is imperative on the State legislatures to make laws prescribing the time, place, and manner of holding elections for senators and representatives, and for electors of President and Vice-President. And in these, as [666] well as in other cases, Congress have a right to revise, amend, or supersede the laws which may be passed by the State legislatures.'

"Now, I do not insist on the exercise of the federal power to the extent as here laid down. I go no farther than to say, that where the Constitution imposes a positive duty on a State, or its officers, to surrender fugitives, that Congress may prescribe the mode of proof, and the duty of the State officers.

"This power may be resisted by a State, and there is no means of coercing it. In this view the power may be considered an important [*sic*] one. So the Supreme Court of a State may refuse to certify its record on a writ of error to the Supreme Court of the Union,<sup>1</sup> under the twenty-fifth section of the judiciary act. But resistance to a constitutional authority by any of the State functionaries, should not be anticipated; and if made, the federal government may rely upon its own agency in giving effect to the laws."

On the whole, Judge McLean seems to support the second construction as the basis of the legislation of Congress. He denies the concurrent power of the States, on the ground that they are the subjects of the rule of action which is to be enforced.

§ 760. The Opinion of Mr. Justice Daniel is to be especially noticed, in considering how far the opinions expressed in this case are extrajudicial. On page 650 of the report Judge Daniel says:—

"Concurring entirely as I do with the majority of the Court in the conclusions they have reached, relative to the effect and validity of the statute of Pennsylvania, now under review, it is with unfeigned regret that I am constrained to dissent from

<sup>1</sup> This occurred in the Wisconsin case, *Ableman v. Booth*; see *post*.



some of the principles and reasonings which that majority, in passing to our common conclusions, have believed themselves called on to affirm.

[651] "In judicial proceedings generally, that has been deemed a safe and prudent rule of action, which involves no rights, nor questions not necessary to be considered; but leaves these for adjudication where, and when, only they shall be presented directly and unavoidably, and when surrounded with every circumstance which can best illustrate their character. If, in ordinary questions of private interest, this rule is recommended by considerations of prudence, and accuracy, and justice, it is surely much more to be observed, when the subject to which it is applicable is the great fundamental law of the confederacy, every clause and article of which affects the polity and the acts of States.

"Guided by the rule just mentioned, it seems to me that the regular action of the Court in this case is limited to an examination of the Pennsylvania statute, to a comparison of its provisions with the third clause of the fourth Article of the Constitution, and with the act of Congress, of 1793, with which the law of Pennsylvania is alleged to be in conflict; and that to accomplish these purposes a general definition or contrast of the powers of the State and federal governments was neither requisite nor proper. The majority of my brethren, in the conscientious discharge of their duty, have thought themselves bound to pursue a different course; and it is in their definition and distribution of State and federal powers, and in the modes and times they have assigned for the exercising those powers, that I find myself compelled to differ with them.

" \* \* \* The paramount authority of this clause in the Constitution to guaranty to the owner the right of property in his slave, and the absolute nullity of any State power, directly or indirectly, openly or covertly, aimed to impair that right, or to obstruct its enjoyment, I admit, nay, insist upon to the fullest extent. I contend, moreover, that the act of 1793, made in aid of this clause of the Constitution, and for its enforcement, so far as it conforms to the Constitution is the supreme law to the States, [652] and cannot be contravened by

them without a violation of the Constitution. But the majority of my brethren, proceeding beyond these positions, assume the ground that the clause of the Constitution above quoted, as an affirmative power granted by the Constitution, is essentially an exclusive power in the federal Government; and, consequently, that any and every exercise of authority by the States at any time, though undeniably in aid of the guarantee thereby given, is absolutely null and void.

"Whilst I am free to admit the powers which are exclusive in the federal Government, some of them became so denominated by the express terms of the Constitution; some because they are prohibited by the States; and others because their existence, and much more their practical exertion by the two Governments, would be repugnant, and would neutralize, if they did not conflict with and destroy each other: I cannot regard the third clause of the fourth Article as falling either within the definition or meaning of an exclusive power. Such a power I consider as originally and absolutely, and at all times, incompatible with partition or association. It excludes everything but itself."

Judge Daniel does not give any opinion on the constitutionality of the statute of 1793, a decision on that point not being material to the judgment. But he speaks of the provision as if it contained a grant of power to "the federal Government" (see p. 652), and only contends that it is not exclusive. By agreeing in the judgment of the court, Judge Daniel must have recognized the right to seize and remove the fugitive, independently of statute, and by this supported the fourth construction. There is nothing in the Opinion to indicate his acceptance of the second construction as a basis for the legislative power, except his speaking of the power conferred in the provision as being a power in "the federal Government." He may not, however, have intended to distinguish such a power in *the Government* from a power belonging to the *judiciary department* of that Government.

§ 761. Mr. Justice Baldwin was the only member of the court who did not admit the Act of Congress to be constitutional. The reporter says, p. 636:—"Mr. Justice Baldwin



concurred in reversing the judgment of the Supreme Court of Pennsylvania, on the ground that the act of the Legislature [of Pennsylvania] was unconstitutional; inasmuch as the slavery of the person removed was admitted, the removal could not be kidnapping. But he dissented from the principles laid down by the Court as the grounds of their opinion." Judge Wayne says, in his several Opinion (p. 637), "All the members of the Court, too, except my brother Baldwin, concur in the opinion the legislation by Congress to carry the provision into execution is constitutional; and he contends that the provision gives to the owners of fugitive slaves all the rights of seizure and removal which legislation could give; but he concurs in the opinion if legislation by Congress be necessary, that the right to legislate is exclusively in Congress."<sup>1</sup>

It appears that Judge Baldwin must have received the fourth construction exclusively.

§ 762. It appears that, of the seven<sup>2</sup> members of the court, five justices—Story, Wayne, Taney, Thompson, and McLean—affirmed the power of Congress to legislate. Mr. Justice Daniel refused to consider the question; and Mr. Justice Baldwin denied that the power belonged to Congress.<sup>3</sup>

Of the five affirming the power of Congress, Judge Story must, from the whole of his Opinion, be taken to have supported the third construction. In this he appears to have been alone, if not supported therein by Judge Wayne, whose language, however, agrees best with the second construction. The second construction seems also to have been adopted by Judge McLean. In the Opinions of Chief Justice Taney and

<sup>1</sup> In *Sims' case*, 7 Cushing, 308, Judge Shaw remarks that Judge Baldwin "had, however, previously expressed an opinion, on the circuit, that the act was constitutional, in the case of *Johnson v. Tompkins*, Baldwin, C. C., 571." But Judge Baldwin's decision in that case had nothing to do with the statute of Congress.

<sup>2</sup> Judges Catron and McKinley are not mentioned in the report.

<sup>3</sup> As to whether the decision of this question was material—if the unconstitutionality of the Pennsylvania statute was a direct consequence of the provisions of the Constitution, the validity of the act of Congress was immaterial. (See Sutliff, J., 9 Ohio, 263.) All the justices, with the exception of Judge McLean, held that the act of Pennsylvania was invalid, merely because conflicting with rights belonging to the plaintiff under the Constitution itself; and Judge McLean held that the States had no power to legislate, even in the absence of legislation by Congress.

Judge Thompson there is also much to favor the same construction, though these two members of the court may possibly have taken that view of the provision which is here called the fourth construction.

It will be remembered that all the justices, except Judge McLean, supported the right of seizure and removal by the claimant owner, as a consequence of their interpretation of the words "shall not be discharged from such service or labor," and therefore gave to that clause of the provision the effect of private law. But no member of the court, unless Judges Taney and Thompson may be so understood, seems to have taken the two clauses of the provision, together, as having the effect of private law, and as creating cases, within the judicial power, between the claimant and the alleged fugitive as the two parties therein. There is but little support, therefore, given by these Opinions to the fourth construction as the basis of the power of Congress.<sup>1</sup>

It will hereafter be seen that this case has generally been understood as sustaining the second construction.

§ 763. The case of *Jones v. Van Zandt*, in the United States Circuit, 1842-3, before Judge McLean, 2 McLean, 597, was an action for harboring and concealing, in Ohio, fugitive slaves belonging to the plaintiff, contrary to the provisions of the Act of Congress. Judge McLean affirms the constitutionality of the statute, but there is nothing in his charge to the jury, *ib.* p. 597, or in his Opinion, *ib.* p. 611, distinguishing the basis of the power of legislation. The power is considered as settled by the Opinion of the Supreme Court in *Prigg's* case. The same case having been carried up to the Supreme Court, 5 Howard 223, Mr. Justice Woodbury, in delivering the Opinion of the Court,<sup>2</sup> did not consider particularly the question of leg-

<sup>1</sup> 1 Kent's Comm. 7th ed. p. 445, note, says that in this case it was "declared that the national Government, in the absence of all positive provisions to the contrary, was bound, through its proper department, legislative, executive, or judiciary, as the case might require, to carry into effect all the rights and duties imposed upon it by the Constitution." Here the case is understood as deciding that the duty imposed by the Constitution is, in the first instance, the duty of the national Government as a whole, according to one adaptation of the third construction—not a duty in the judiciary, according to Story's adaptation of that construction or according to the fourth, nor a duty of the States, according to the first and second.

<sup>2</sup> *Jones v. Van Zandt*, 5 Howard (1846), p. 229:—"This court has already,



islative power, viewing it as already settled by authority. In the extract from the Opinion, given in the note below, there is, avowedly, a brief repetition of Judge Story's ideas given in *Prigg's* case. There is the same superfluous assertion of the necessity of the constitutional provision, and in some places a similar statement of its effect on private persons, harmonizing best with the fourth construction. But in other passages there is a general reference to "duties imposed on the general Government" to enforce the provision, "whether in favor of itself or others"—language which may better suit the third construction, and is not perhaps incompatible with the second.

after much deliberation, decided that the Act of Feb. 12, 1793, was not repugnant to the Constitution. The reasons for their opinion are fully explained by Justice Story, in *Prigg v. Pennsylvania*, 16 Peters, 611.

"In coming to that conclusion, they were fortified by the idea that the Constitution itself, in the clause before cited, flung its shield, for security, over such property as is in controversy in the present case, and the right to pursue and reclaim it within the limits of another State.

"This was only carrying out, in our confederate form of government, the clear right of every man at common law to make fresh suit and recapture of his own property within the realm. 3 Black. Com. 4.

"But the power by national law to pursue and regain most kinds of property, in the limits of a foreign Government, is rather an act of comity than strict right; and hence, as the property in persons might not thus be recognized in some of the States in the Union, and its reclamation not be allowed through either courtesy or right, this clause was undoubtedly introduced into the Constitution as one of its compromises, for the safety of that portion of the Union which did permit such property, and which otherwise might often be deprived of it entirely by its merely crossing the line of an adjoining State. 3 Madison Papers, 1569, 1589.

"This was thought to be too harsh a doctrine in respect to any title to property, of a friendly neighbor, nor brought nor placed in another State, under its laws, by the owner himself, but escaping there against his consent, and often forthwith pursued in order to be reclaimed.

"The Act of Congress, passed only four years after the Constitution was adopted, was therefore designed merely to render effective the guarantee of the Constitution itself; and a course of decisions since, in the courts of the States and of the general Government, has for half a century exhibited great uniformity in favor of the validity as well as expediency of the Act. 5 Serg. & R. 62; 9 Johns. 67; 12 Wend. 311, 507; 2 Pick. 11; Bald. C. C. 326; 4 Wash. C. C. 326; 18 Pick. 215.

"While the compromises of the Constitution exist, it is impossible to do justice to their requirements, or fulfill the duty incumbent on us towards all the members of the Union, under its provisions, without sustaining such enactments as those of the statute of 1793.

"We do not now propose to review at length the reasoning on which this Act has been pronounced constitutional. All of its provisions have been found necessary to protect private rights, under the clause in the Constitution relating to this subject, and to execute the duties imposed on the general Government, to aid, by legislation, in enforcing every constitutional provision, whether in favor of itself or others. This grows out of the position and nature of such a Government, and is as imperative on it in cases not enumerated specially in respect to such legislation, as in others.

"That this Act of Congress, then, is not repugnant to the Constitution, must be considered as among the settled adjudications of this court."

§ 764. In *Kauffman v. Oliver* (1849), 10 Barr, 516, where the question was of the power of the State courts to entertain an action for harboring slaves and aiding them to escape, the Pennsylvania Supreme Court, Coulter, J., after saying that "slavery then is recognized and enforced here by virtue of that compact alone," and reciting the provision, says:—"Upon claim made by the person to whom service is due, the fugitive shall be delivered up. To whom shall this claim be made? Undoubtedly to the person or persons who shall have the alleged slave in custody, or who shall attempt to protect him from the owner to whom the services are due. And as, by the compact, the slave is not discharged from his service by escaping into a free State, the owner, or his authorized agent, may pursue and take him without riot or breach of the peace, by manucaption or reprisal in any place where the compact is obligatory, just in the same manner as if the recaption was in the slave territory. Sovereignty is so far yielded by the free States, and so far the constitutional provision executes itself. But if the fugitive is harbored, protected, concealed, or enticed by any persons, the owner must make the claim in a legal manner and by legal process, according to the Constitution and laws of the United States. The mode, manner, and circumstance of such claims are fully set forth in the Act of Congress of 1793, and the means of making such claims effectual are therein provided.

"Congress has regarded this claim to the service of the fugitive as a right of property, and that is the only light in which it can be viewed; and it must be made by one person or persons against another person or persons, properly, to be asserted in a court of justice. It is therefore a controversy between parties arising under the Constitution and laws of the United States, and must be referred to the forum having jurisdiction of such controversies. The Constitution of the United States declares that the judicial power of the courts of the United States shall extend to all cases arising under the Constitution and laws of the United States, &c. This cause of action, good or bad, is within the jurisdiction of the United States courts; for Congress has power to pass all laws neces-



sary to make the claim efficacious and commensurate with the constitutional provision. But it must be done through the court over which Congress have power and through their instrumentality; otherwise the claim might be rendered abortive by the decisions of State courts pursuing their local policy. The claim ought primarily to be asserted in courts whose decisions would conclude the subject of dispute, and not in a foreign forum adverse to the whole process, if it pursued the feelings and policy of its own laws and the principles of the common law. The provisions of the Act of Congress must be pursued in the tribunals of the United States. There they meet with no warfare by local legislation or municipal peculiarities. And the person claiming the services of the fugitive is in the forum of that sovereignty and jurisdiction under which his claim is made. Within the terms of the compact, and within the Act of Congress, we acknowledge the validity of the claim when made in the proper forum. But outside the compact we breathe more freely. We feel the genial influence of the common law on this subject," &c.

In this case, the Pennsylvania court seems to be endeavoring to follow out the doctrine of Prigg's case. But the view taken by Judge Coulter accords best with the fourth construction. The idea that the claim contemplated in the provision can only be made when the owner demands the slave, as a tertium quid, from some antagonist party, is the same which Judge Story advanced, 16 Peters, p. 616 (*ante*, p. 467). But Judge Story found this antagonist party in the national Government. Under the first and second constructions the claim is against the State in which the fugitive is found, and which, under those constructions, is to make the delivery. There is probably no other judicial authority to be found which supports the view taken in this case, that is, that some private person in possession of the slave is by the Constitution required to deliver him up on claim.<sup>1</sup>

<sup>1</sup> The court seems to hold that the power of Congress to legislate is founded upon the existence of such a case within the judicial power of the United States. But according to the same opinion there is no such case unless the supposed slave is concealed or detained as property by some third party. If, then, the supposed slave is merely acting as a free person, the Act of Congress cannot apply to him. His owner has no remedy given him by Congress and can have none.

In holding that the claim which arises under the Constitution is a case within the judicial power, and that the legislation of Congress is based on the purpose of carrying this power into effect, this Opinion agrees with the fourth construction and with that adaptation of the third construction which was held by Story to be the basis of the power of Congress.

§ 765. In *State v. Hoppess* (1845), 2 West. L. Journal, 289, the defendant, on the return to the writ of habeas corpus, returned that he had seized, as a fugitive from his service, the person whom he was required to produce, and had brought him before a justice, for the purpose of proving his claim according to the law of Congress. Judge Read, of the Supreme Court of Ohio, in remanding the supposed fugitive to the custody of the defendant, said, in respect to the objection that the provision "confers no power upon Congress to legislate upon the subject, but only imposes a duty upon the States, to be executed by their own laws :"—"When the Constitution imposes a duty or secures a right, Congress is empowered to enact such laws as are necessary to enforce the one and secure the other. The subject of slavery is one of irritation and difficulty; and if it were left to the States to secure the rights of the master to his fugitive slave, the provision that the escape should not discharge the right to service would probably be of little worth," &c. "In this way the compromise might be totally evaded, or its entire spirit violated. And if Congress should attempt to enforce it, it would be by acting on the States." Then, after saying that this was the idea of the confederation:—"Our Constitution remedies this defect by bringing the powers of the general Government to act upon individuals directly, instead of States. Hence, the powers of Congress should be construed to remedy the evil and advance the intention of the framers of the Constitution. If this were wholly a new question, I should decide that Congress not only had the power, but that it is a duty imposed upon Congress to legislate upon this subject. But this is not an open question," &c. The idea seems to be, that the duty correlative to the owner's right is not a duty of the State; but the judge does not distinguish whether Congress gets the power through the power of the judiciary department



over a case arising between two private persons or between the owner and the general Government; or by a more immediate process of implication.<sup>1</sup>

In *Driskill v. Parrish* (1847), 3 McLean, 631, the action was for the penalty under the Act of Congress for obstructing the claimant and for harboring, &c. A portion of Judge McLean's charge<sup>2</sup> is important in the present inquiry as affirming the right of the owner to seize and remove the fugitive independently of legislation, which doctrine it is herein supposed agrees best with the fourth construction.<sup>3</sup>

§ 766. In the judicial opinions which, in cases arising under the Act of 1850, have sustained the power of Congress to legislate in respect to fugitive slaves, there is very little by way of independent discrimination of the basis of that power, and the decisions under the law of 1793 are mainly relied on, as precluding the inquiry.

The earliest decision under the Act of 1850, being also that which is most relied on in the later cases for sustaining that statute, is that of the Supreme Court of Massachusetts, in *Sims' case* (April, 1851), 7 Cushing, 285. Chief Justice Shaw, delivering the Opinion of the Court, began by describing the

<sup>1</sup> *Graves v. The State* (1849), 1 Carter's Ind. 368, merely affirms *Prigg's case* as authority that State legislation is void.

<sup>2</sup> 3 McLean, 634:—"The object of the arrest in the present case was avowed to be to take the fugitives before a judicial officer. But the same principle applies where the arrest is made for the purpose of taking the fugitive out of the State, and without judicial sanction." The judge referred to *Prigg's case* as the authority. He also cited *Johnson v. Tompkins*, Baldwin, 581, and *Washington, J.*, in 4 Wash. 329, as sanctioning such a seizure. But it will be remembered that in the last of these the seizure is justified for the purpose of taking before a judge (*ante*, p. 440), and in the first case the rights of the claimant rested on the law of the State of Pennsylvania. *Ante*, p. 446.

<sup>3</sup> In *Giltner v. Gorham* (1848), 4 McLean, 402, where the action was for the value of slaves whom the plaintiff or his agents had attempted to seize in Michigan, with the design either to apply for a certificate or to remove without it, and whom the defendants enabled to escape to Canada, Judge McLean, in his Opinion or charge, seems again to have recognized the doctrine stated by him in the above case. The following sentences, from p. 425 of the report, are the most material, though in themselves nothing more than the ordinary judicial commonplace:—"This provision of the Constitution is a guaranty to the slave States that no act should be done by the free States to discharge from service in any other State any one who might escape therefrom, but that such fugitive should be delivered up on claim being made. The clause was deemed so important, that, as matter of history, we know the Constitution could not have been adopted without it. As a part of that instrument, it is as binding upon courts and juries as any other part of it." And see, to the same purpose, in a similar case, *Ray v. Donnell and Hamilton*, ib. 505.

Constitution as a treaty or compact between the States, as absolutely distinct and sovereign nationalities at the time of its adoption, and proposed to "ascertain the true meaning and effect" of this provision, as determined by such a theory (*ib.* 295-297). He observed of the provision:—"We think it was intended to guaranty to the owner of a slave, living within the territory of a State in which slavery is permitted, the rights conferred upon such owner by the laws of such State, and that no State should make its own territory an asylum and a sanctuary for fugitive slaves, by any law or regulation, by which a slave who had escaped from a State where he owed labor or service, into such State or Territory, should avoid being reclaimed; it was designed, also, to provide a practicable and peaceable mode by which such fugitive, upon the claim of the person to whom such labor or service should be due, might be delivered up."

After stating cases to which the provision does not apply, Judge Shaw further said, *ib.* 299:—"To the extent, however, to which this privilege or benefit goes, that of securing the return of persons, owing service or labor in one State, who had fled or escaped into another, this provision of the constitution must be regarded as complete and sufficient to the proposed right. But the constitution itself did not profess or propose to direct, in detail, how the rights, privileges, benefits, and immunities intended to be declared and secured by it, should be practically carried into effect; this was left to be done by laws to be passed by the legislature, and applied by the judiciary, for the establishment of which full provision was at the same time made. The constitution contemplated a division and distribution of the powers incident to a sovereign state, between the general government of the United States and the government of each particular State; a distribution not depending on local limits, but made by selecting certain subjects of common interest and placing them under the entire and exclusive jurisdiction of the general government; such, for instance, as the foreign relations of the country, the subject of war and peace, treaties, the regulation of commerce with foreign nations, and among the several States, and with the



Indian tribes. These are a few of the most prominent subjects, by way of illustration.<sup>1</sup> And the theory of the general government is, that these subjects, in their full extent and entire details, being placed under the jurisdiction of the general government, are necessarily withdrawn from the jurisdiction of the State, and the jurisdiction of the general government, therefore, becomes exclusive. And this is necessary to prevent constant collision and interference; and it is obvious that it must be so, because two distinct governments cannot exercise the same power, at the same time, on the same subject matter. This is not left to mere implication. It is expressly declared, Article I., § 8, that congress shall have power to make all laws which shall be necessary and proper, for carrying into execution all the powers vested by the constitution, in the government of the United States, or in any department or officer thereof. And by Art. 6, 'this constitution, and the laws of the United States which shall be made in pursuance thereof, and all treaties made, or which shall be made under the authority of the United States, shall be the supreme law of the land; and the judges in every State shall be bound thereby, anything in the constitution or laws of any State to the contrary notwithstanding.' All such laws, made by the general government, upon the rights, duties, and subjects, specially enumerated and confided to their jurisdiction, are necessarily exclusive and supreme, as well by express provision, as by necessary impli-

<sup>1</sup> In the report, an explanatory note to the Opinion is added, in which (7 Cushing, 317) the Judge again referred to these specific grants to the national Government to act in reference to certain international relations and interests of the States, arguing that the States stand in an international relation in respect to fugitive slaves, and that, *therefore*, it must have been intended that the whole subject should be within the legislative, judicial, and executive powers of the general Government. In this connection, the Judge said that the framers of the Constitution must have known "that in the States where slavery was allowed by law, certain rights attached to its citizens which were recognized by the laws of nations, and which could not be taken away without their consent. They, therefore, provided for the limited enjoyment of that right as it existed before, so as to prevent persons owing service under the laws of one State and escaping therefrom into another, from being discharged by the laws of the latter, and *authorized the general Government to prescribe means for their restoration.*" Could Judge Shaw have intended to say that the owners of slaves had, by the laws of nations, a right which could not be taken away without their consent, to retake the slaves who had escaped into other States? He had, in this Opinion, declared that in the absence of the provision, the owner's claim would have depended entirely on the will of the State. Compare Judge Nelson, *ante*, p. 447, note.

cation. And the general government is provided with its executive, legislative, and judicial departments, not only to make laws regulating the rights, duties, and subjects thus confided to them, but to administer right and justice respecting them in a regular course of judicature, and cause them to be carried into full execution, by its own powers, without dependence upon State authority, and without any let or restraint imposed by it.

"It was, we believe, under this view of the right of requiring, specifically, the custody of one from whom service or labor is due by the laws of one State, and who has escaped into another, and under this view of the powers of the general government and the duty of congress, that the law of 1793 was passed."

In regarding the provision as a treaty between independent nations, in speaking of the States as bound by this compact and in attributing, at the same time, to the national Government a power to carry it into effect, Judge Shaw seems to have supported the second construction. But it is also implied that the provision itself creates legal rights and obligations in private persons which the national Government is bound to maintain, and this may better accord with the third or the fourth construction. But if either the second or third construction was adopted by Judge Shaw, it is plain that his assertion, in the passage above noted, that the framers of the Constitution had *authorized the general Government to prescribe means for the restoration of fugitive slaves*, has no better logical basis than may be found for the similar assertion made by Judge Story in Prigg's case.

The judge did not pretend that there was anything in the words of the Constitution to indicate such a grant of power; but the power is by him attributed to the Government as a whole, not to the judiciary or to some other department or officer thereof.<sup>1</sup>

<sup>1</sup> The questions presented in this case to the State Court were also argued before Judge Sprague, of the United States District Court, on application for habeas corpus in behalf of Sims. The Court, in refusing the petition, sustained the law of Congress; but no opinion of the judge has been published. The application to Judge Woodbury, as United States Circuit Judge, was on different grounds, and his decision had no reference to the question here considered. IV. Monthly Law Reporter, 10.



§ 767. On the trial of Allen, U. S. Deputy Marshal at Syracuse, June 21, 1852, before the New York Supreme Court Circuit, for violation of the State law of 1840<sup>1</sup> in the matter of the fugitive Jerry, the defence relied on the warrant of a U. S. Commissioner under the statute of 1850. The trial was before Hon. Richard P. Marvin. A report of the arguments and the charge of the judge were printed in pamphlet, at the office of the Syracuse Daily Journal. In his charge, Judge Marvin discussed the authority of Congress. He regarded the Constitution as a compact between the States as separate nationalities, and the provision as a treaty binding the States as political persons. His argument appears to be, that power over all the international relations of the States was expressly given to the general Government, and that the States were forbidden to make treaties with each other; that hence they can have no power in the international relations arising out of this treaty provision; that the power over the whole subject must be in Congress, or at least is a resulting power in the Government. See pp. 88, 91, 92, of the pamphlet.

§ 768. In *Miller v. McQuerry* (1853), 5 McLean, 472, where the custody appears to have been exercised under the law of 1850, Judge McLean, sitting at chambers, answering the objection "that the Constitution left the power with the States, and vested no power on the subject in the federal Government," referred to *Prigg's* case and the weight of authority in favor of the power of Congress, and reasserted that view of the provision which is herein called the second construction.<sup>2</sup>

<sup>1</sup> See *ante*, pp. 59, 60.

<sup>2</sup> As he seems to have done before in *Prigg's* case, *ante*, § 759. In this instance he said, 5 McLean, 474:—"This argument has been sometimes advanced, and it may have been introduced into one or more political platforms. In regard to the soundness of this position, I will first refer to judicial decisions. In the case of *Prigg, &c.*, the judges of the Supreme Court, without a dissenting voice [Judge McLean must have forgotten Judge Baldwin], affirmed the doctrine that this power was in the Federal government. A majority of them held that it was exclusively in the general government. Some of the judges thought that a State might legislate in aid of the Act of Congress, but it was held by no one of them that the power could be exercised by a State except in subordination of the Federal power.

"Every State court which has decided the question, has decided it in accordance with the view of the Supreme Court. No respectable court, it is believed, has sustained the view that the power is with the State. Such an array of authority can scarcely be found in favor of the construction of any part of the Con-

§ 769. The case of Booth, June term, 1854, 3 Wisconsin R. p. 1, was on petition of Booth, in vacation, to Judge Smith of the Supreme Court of the State, to be discharged from the custody of Ableman, U. S. Marshal, by whom he was held under a warrant issued by a U. S. Commissioner, for having "unlawfully aided, assisted, and abetted a person named Joshua Glover, held to service or labor in the State of Missouri under the laws thereof, and being the property of one Garland, and having escaped therefrom into the State of Wisconsin, to escape from" the custody of a U. S. Marshal, by whom he was held in virtue of a warrant issued by a U. S. District Judge. Judge Smith decided that the petitioner was entitled to his discharge

stitution which has ever been doubted. But this construction, sanctioned as it is by the entire judicial power, State as well as Federal, has also the sanction of the legislative power." Judge McLean then refers to the legislation of Congress, and speaks of the motive or object of the provision as of great importance. He then observes, on p. 475:—

"An individual who puts his opinion, as to the exercise of this power, against the authority of the nation in its legislative and judicial action, must have no small degree of confidence in his own judgment. A few individuals in Massachusetts may have maintained, at one time, that the power was with the States; but such views were, it is believed, long since abandoned, but they are reasserted now more as a matter of expediency than of principle.

[p. 476.] "But whether we look at the weight of authority against State power, as asserted, or at the constitutional provision, we are led to the same result. The provision reads" (etc., reciting it). "This, in the first place, is a federal measure. It was adopted by the national convention, and was sanctioned as a federal law by the respective States. It is the supreme law of the land. Now, a provision which cannot be enforced, and which has no penalty for its violation, is no law. The highly respectable gentleman who read an ingenious argument in support of these views [Dr. Brisbane, of South Carolina] is too good a theologian to contend that any rule of action which may be disregarded without incurring a penalty, can be law. This was the great objection to the articles of confederation. There was no power to enforce its provisions. They were recommendatory and without sanctions. There is no regulation, divine or human, which can be called a law, without a sanction. Our first parents, in the garden, felt the truth of this. And it has been felt by violators of the divine or human laws throughout the history of our race.

"The provision in the constitution is prohibitory and positive. It prohibits the States from liberating slaves which escape into them, and it enjoins a duty to deliver up such fugitives on claim being made. The constitution vests no special power in Congress to prohibit the first or to enforce the observance of the second. Does it, therefore, follow that effect can be given to neither, if a State shall disregard it? Suppose a State declares a slave, who escapes into it, shall be liberated, or that any one who shall assist in delivering [p. 477] him up shall be punished. If this power belongs to the States and not to the Federal government, these regulations would be legal, as within the exercise of their discretion. This is not an ideal case. The principle was involved in the Prigg case, and the Supreme Court held the act of the State unconstitutional and void.

"It is admitted that there is no power in the Federal government to force any legislative action on a State. But if the Constitution guarantees a right to the



by reason of the unconstitutionality of the law of Congress of 1850, as well as by defects in the warrant.

A *certiorari* having been applied for, and allowed by the same judge, the cause came on for argument at the June term, 1854, before a full bench, consisting of Chief Justice Whiton, and Justices Crawford and Smith.<sup>1</sup> The Opinion of the court confirming Judge Smith's separate decision was delivered by the Chief Justice. In this Opinion, the Chief Justice notices the opinions in favor of the power of Congress to legislate on the subject, which were expressed in cases arising under the law of 1793, but, without either affirming or denying the general power, decides that the law of 1850 is unconstitutional for objections which could not have been made against the former Act. The Opinion, therefore, throws no light on the question here examined—the construction of the provision and the basis of legislative power.

master of a slave, and that he shall be delivered up, the power is given to effectuate that right. If this be not so, the Constitution is not what its framers supposed it to be. It was believed to be a fundamental law of the Union. A federal law. A law to the States and to the people of the States. It says that the States shall not do certain things. Is this the form of giving advice or recommendation? It is the language of authority to those who are bound to obey. If a State do the thing forbidden, its act will be declared void. If it refuse to do that which is enjoined, the Federal government, *being a government* [ital. in rep.], has the means of executing it.

"The constitution provides 'that full faith and credit shall be given to public acts, records, and judicial proceedings' of one State in every other. If an individual, claiming this provision as a right, and a State court shall deny it, on a writ of error to the Supreme Court of the Union, such judgment would be reversed. And the provision that 'the citizens of each State shall be entitled to all privileges and immunities of citizens in the several States.' Congress, unquestionably, may provide in what manner a right claimed under this clause and denied by a State, may be enforced. And if a case can be raised under it, without any further statutory provisions, so as to present the point to the Supreme Court, the decision of a State court denying the right would be reversed. So a State is prohibited from passing a law that shall impair the obligations of a contract. Such a law the [p. 478] Supreme Court has declared void. In these cases, and in many others where a State is prohibited from doing a thing, the remedy is given by a writ of error under the legislation of Congress. The same principle applies in regard to fugitives from labor. A fugitive from justice may be delivered up under a similar provision in the constitution," &c., reciting it, with the remark that "in both cases Congress has provided a mode in which effect shall be given to the provision. No one, it is believed, has doubted the constitutionality of the provision [meaning, of course, *the statute*] in regard to fugitives from justice."

<sup>1</sup> Byron Paine, Esq., elected judge of the Court in 1859, was counsel for the petitioner, against the constitutionality of the law of Congress. J. R. Sharpstein, Esq., U. S. Dist. Attorney, and E. G. Ryan, Esq., were counsel for the respondent. The arguments are not given in the State report. They are given in a pamphlet report, published at the office of the Free Democrat, Milwaukee.

Mr. Justice Crawford concurred with his brethren "in holding the petitioner entitled to be discharged, because the commitment sets forth no just cause of detention," and that it did not "appear from this process that Glover [the supposed slave] was committed to the custody of Mr. Cotton, the Deputy Marshal, upon claim of any person whatever," &c. (ib. 87.)

Judge Crawford dissented from the other justices, in holding the law of 1850 to be constitutional, and from Judge Smith, by asserting generally the power of Congress to legislate on the subject. On page 73, he says:—"From all the information which I have derived from the lengthy arguments in the present case, from the nature and history of the clause in the Constitution of the United States, in pursuance whereof the law was enacted by Congress, as well as from an examination into the several cases reported in the federal and State courts in which this precise question has been adjudicated, I am satisfied that Congress has the constitutional power to legislate," &c. Judge Crawford then remarks that but for the judicial authority to the contrary, he should support the doctrine of concurrent State legislation. After citing the older cases, he says, on p. 80:—"From these decisions, I am led to view the subject as definitely settled, and the maxim, *stare decisis*, as entirely applicable. I understand the Chief Justice to feel himself concluded by these decisions, so far as they declare the Act of 1793 to have been the exercise of a constitutional power by Congress to legislate, but that," &c. On the same page, Judge Crawford said that the force of the argument on *both* sides had raised a doubt in his mind as to the constitutionality of the law of 1850, but he did not otherwise express opinions bearing on the questions here considered.

§ 770. It appears that in denying altogether the power of Congress to legislate on this subject, Judge Smith was alone. For this reason, probably, he wrote out the notes of the Opinion delivered by him on the *certiorari*. The Opinion delivered by him on his original decision, occupies forty-two pages of the report, and the second, fifty-seven pages, and the space required precludes their insertion here in full. Since the commitment was on both occasions held void for other reasons, the



opinions on the constitutionality of the Act of Congress may be thought extra-judicial. They are, however, not so in any greater degree than were those in *Prigg's* case, and since it is the earliest judicial opinion opposed in all points to the doctrines maintained by Judge Story and other judges in that case, an abstract of Judge Smith's two Opinions, which, of course, are in their principal features alike, will here be made, accompanied by citations of the passages bearing most directly on the question considered in this chapter.

In the first Opinion, the judge begins (pp. 7-19) by a preliminary statement of his position as a State judge called on to decide on the validity of a custody under the warrant of a United States Commissioner, distinguishing that custody from one under the authority of a judicial officer of the federal Government, and denying that there was in this instance any conflict of jurisdiction.<sup>1</sup> Next, on pp. 19-22, he examines into the sufficiency of the warrant, concluding that it was defective, and gives his view of the position of State judiciaries in reference to powers assumed by the national Government (pp. 22-25). He then proceeds to examine the question of the constitutionality of the law of Congress, on p. 25 :—

"The Constitution of the United States is a peculiar instrument, and it has brought into existence and operation a peculiar system of government. But little if any aid is furnished in its construction by analogy. It is not merely a grant of powers. It not only confers powers upon the federal government, but it [26] guarantees rights to the States and to the citizens. It was not designed merely to provide a general government for all the States, but to provide security and protection for the States and people, who are parties to the compact by which it is created. Not only did it confer certain powers upon the general government, but it imposed solemn duties upon the government thereby created, and upon the States who were its creators. More than this, it solemnly enjoined upon both the State and general government, the exercise of certain powers and duties, and the abstaining by each, from the exercise of powers and functions exclusively pertaining to the other.

<sup>1</sup> Compare *ante*, Vol. I., p. 495.

"It is an instrument of grants and covenants. Somewhat like an indenture of conveyance, it contains not only grants of powers, but covenants for the faithful observance of the stipulations therein contained. It creates three distinct departments of government, the executive, legislative, and judicial, and grants to each, the powers which it was designed that they should respectively exercise; and those powers not granted or prohibited to the States, it especially reserved to the States and the people. In addition to this, the States, parties to the instrument, by it, solemnly and mutually engaged that they would do certain things, and that certain things should not be done either by the government of the Union or of the States. The language of the Constitution is so peculiar, that the distinction between power to be conferred upon the government about to be created, and covenants entered into between the parties, as States, is obvious at a glance. Congress may exercise all the legislative power granted in the Constitution, but no other, because all others are especially reserved to the States and to the people. [27] In the same article which grants the legislative powers to Congress, and enumerates and defines them, is contained also a prohibitory covenant or compact by which the States have agreed not to do certain things, which, before, as sovereignties, they had an undoubted right to do. 'No State shall grant letters of marque and reprisal, coin money, emit bills of credit, make anything but gold and silver coin a legal tender, pass any bills of attainder, ex post facto law, or any law impairing the obligation of contracts,' &c.

"Now suppose, in violation of this compact, any State should do any of the things herein prohibited. Is it pretended that Congress has the right to make such acts on the part of the officers of the State penal? or by legislation, call such offending State to account? exclude it from the Union? expel its representatives from their seats? arrest its executive, its legislators and judges, and imprison them? The acts of such State would be simply void; and it would be the duty of all courts, both Federal and State, so to declare them. They would afford no protection to any person or officer acting under them, not because Congress has any legislative power to



denounce or abrogate them, but because they are in violation of the fundamental law.

"So also, in the same section are contained sundry prohibitions upon the United States, among which is the following:—'The privilege of the writ of Habeas Corpus shall not be suspended, unless when in cases of rebellion or invasion the public service may require it.' Suppose, in a time of profound peace and quiet, the federal government should pass a law suspending the privileges of this writ, would the State governments have the power to call to account the federal officers who had violated the compact in this behalf? the Congress who passed, and the executive who approved it? Would the State courts be bound by it? Not at all. Such an act of Congress would simply be void, and it would be the duty of every State and Federal court so to pronounce it, and it would afford no protection to any officer, State or Federal, for refusing to obey such writ. I mention these illustrations to show that a great portion of our federal Constitution rests in compact, while still another rests in grant. Where powers are granted, they are to be exercised; where rights rest in compact, they have still the force of law; but the federal Government has no power to legislate upon them; they are to be obeyed and enforced by the parties to the compact, the States themselves."

The judge then sketches the history of the provision contained in the first section of the fourth Article, and describes the original proposal of a provision for the surrender of fugitive slaves, made in the Convention, August 28, 1787, as given in Madison Papers, 1447-8. On page 30 he then says:—

"This history is important, as it not only justifies and requires a distinction to be taken between grants of power and articles of compact, but it clearly demonstrates that the convention all along discriminated between grants of power to the Government, and articles of compact between the States, and was extremely jealous and cautious in making such grants, and only did so when it was deemed absolutely necessary.

"Having now traced through this compact, and discovered the time and manner when it became coupled with a power,

let us trace along its neighbor, in regard to the reclaiming of fugitive slaves, and discover, if we can, the time and manner in which it shall be coupled with a grant of power to Congress, to secure its efficacy by legislation. We have seen that the first suggestion in regard to the subject was on the 28th day of August, when Mr. Pinckney and Mr. Butler moved to connect it with the surrender of fugitives from justice, but withdrew the proposition for the purpose of making a separate provision. On the 29th day of August, Mr. Butler offered such provision in these words:—

“‘If any person bound to service or labor in any of the United States, shall escape into another State, he [31] or she shall not be discharged from such service or labor in consequence of any regulations subsisting in the State to which they escape, but shall be delivered up to the person justly claiming their service or labor.’ ‘Which was agreed to *nem con.*’

“Here we have all the discussion upon the subject. Plan after plan for the organization of the government was made and presented, resolution upon resolution offered and discussed, embracing the whole ground of Federal and State rights and powers, without one word being mentioned of fugitive slaves; and when it did occur to the minds of some members, suggested, unquestionably, by the clause in regard to fugitives from justice, it is quietly agreed that the States would deliver up such fugitives from labor. No power was asked for the federal Government to seize them; no such power was dreamed of; the proposition that the States should respectively deliver them up, was acquiesced in without any dissent. Yet we are told *arguendo* by judicial authority, that without such a clause the Union could not have been formed, and that this provision was one of the essential compromises between the South and the North.<sup>1</sup> In point of fact, it did not enter in the slightest degree into the compromises between the North and South. I have had time and opportunity to examine the debates in the conventions for the adoption of the Constitutions of only the States of North Carolina and

<sup>1</sup> See *ante*, the notes on pp. 439, 445, 497, and Nelson, J., in his charge, October, 1852, 2 Blatchford, 561.



South Carolina. In the former, the whole of article four was read, and though the grants of power, as contradistinguished from mere compact, were scrutinized closely, no objection was made to the absence of such grant, but the article was acquiesced in with only a few words of explanation from Mr. Iredell, who [32] stated that the 'northern delegates, owing to their particular scruples on the subject of slavery, did not choose the word *slave* to be mentioned, but that was their meaning.' In the South Carolina convention, I have been unable to find a word of comment upon the subject. In Virginia, it was discussed by Messrs. Madison and Randolph, who never claimed for it the character of a power delegated to the national government. It is nowhere mentioned as entering into the compromises of the Constitution. How, then, can any one say, that without this provision the Union could not have been formed? And yet such assertion, contradicted by the truth of history, is made the pretext for the exercise of powers by the general government, that could not stand for a single moment upon a similar basis, in respect to any other subject matter.

"We have seen how the power of legislation was granted to Congress in respect to public records, &c. We have seen that no such power is granted in respect to the surrender of fugitives from labor, and that it was not even asked for; and from the known temper and scruples of the national convention, we may safely affirm, that had it been asked it would not have been granted, and had it been granted, no Union could have been formed upon such a basis. The history of the times fully justifies this conclusion. Can it be supposed for a moment, that had the framers of the Constitution imagined, that under this provision the federal government would assume to override the State authorities, appoint subordinate tribunals in every county in every State, invested with jurisdiction beyond the reach or inquiry of the State judiciary, to multiply executive and judicial officers *ad infinitum*, [33] wholly independent of, and irresponsible to the police regulations of the State, and that the whole army and navy of the Union could be sent into a State, without the request, and against the re-

monstrance of the legislature thereof; nay, even that under its operation the efficacy of the writ of Habeas Corpus could be destroyed, if the privileges thereof were not wholly suspended; if the members of the convention had dreamed that they were incorporating such a power into the Constitution, does any one believe that it would have been adopted without opposition and without debate? And if these results had suggested themselves to the States on its adoption, would it have been passed by them, *sub silentio*, jealous as they were of State rights and State sovereignty? The idea is preposterous. The Union would never have been formed upon such a basis. It is an impeachment of historic truth, to assert it.

"The clause in regard to public records forms one section by itself, with its grant of power added upon full consideration. The second section of the same article contains three clauses, but all grouped and numbered together."

The judge recites the three clauses, and, on p. 34, says:—

"Here is the whole of the section, without one word of grant, or one word from which a grant may be inferred or implied. Congress has the same power to legislate in regard to fugitives from justice or labor. But it may be asked, how are the rights here stipulated and guaranteed, to be enforced? I answer, that every State officer, executive, legislative, and judicial, who takes an oath to support the Constitution of the United States, is bound to provide for, and aid in their enforcement, according to the true intent and meaning of the Constitution. But what if one or more States should refuse to perform their duty, and its officers violate their oaths and repudiate the compact? This question is answered by asking another—What if Congress should declare a single violation of one of its laws, treason, and that a conviction thereof should work corruption of blood and forfeiture of estate beyond the life of the person attainted, and the judicial department should pronounce it valid, and the executive attempt to enforce it? The simple answer is, that when the State and federal officers become so regardless of their oaths and obligations as either question implies, anarchy or revolution, or both, must supervene, for the government would be a willful departure from



the fundamental law of its organization, and the people would be absolved from their allegiance to it. I do not mean to say that at every minor, or unintentional departure from the Constitution must work such disastrous results. On the part of the States and the people there is a fixed attachment to the Constitution, [35] and when its provisions are violated or its restraints overleaped, discussion ensues, and the government is brought back to the constitutional tack; but I repudiate the grading insinuation that State officers are less faithful to the Constitution than federal officers. On the contrary, from the very fact that upon them is devolved the duty and responsibility of guarding the rights and sovereignty of the States under the compact of the Union, they must necessarily be more watchful of the exercise or assumption of power, on the part of the States respectively and of the general government, than federal officers would naturally be.

"It may be again repeated, and cannot be repeated too often, that upon the States rests the immense responsibility of reserving not only their own sovereignty, but the just constitutional powers of the general government. Let it also be remembered, that the States and their civil functionaries are as essential to the existence and operation of the government of the Union as are the peculiar officers of the latter. Each and all are parts of a united whole, and all are bound by the most solemn ties of fidelity to all and every part thereof.

"What would be thought by the people of this country, should Congress pass a law to carry into effect that clause of the fourth article in regard to citizenship? and declare pains and penalties against any State functionary who should fail to comply? What would be thought if Congress should declare it a penitentiary offence, for any executive of a State to refuse to surrender a fugitive from justice? What State would submit to see its chief magistrate dragged before the federal tribunals, on charge of infraction of such a law, or what federal court would assume to compel his obedience [36] by mandamus? And yet the assumption of power to legislate at all upon the subject, is assuming supreme and unlimited power over the whole matter. There is no middle ground. A bare

statement of the proposition assumed, is its most effectual refutation.

"The law of 1793 was in fact but little, if any more than organizing the State authorities for the accomplishment of the constitutional duties devolved upon them. For that very reason it passed without scrutiny, and for a long time was obeyed without question. It was *practically* nothing more than the States themselves carrying out the constitutional compact. Not until it began to be required that the States should yield up all control over these subjects, and a prostration of their sovereignty was demanded, did attention become aroused. No importance, therefore, can justly be attached to the fact that this act was passed by an early Congress and was signed by the father of his country, and was acquiesced in by the States and people. It is a remarkable fact that the most startling deviations from strict constitutional limits occurred in the very earliest years of the Republic. So it must always be. But time, discussion, and experience have heretofore proved adequate correctives. So may they ever prove. Added to these, State sovereignty jeopardized, federal encroachment apprehended, and consolidation menacing, can hardly fail to accomplish the desired ends.

"To my mind, therefore, it is apparent that Congress has no constitutional power to legislate on this subject. It is equally apparent, that the several States can pass no laws, nor adopt any regulations, by which the fugitive may be discharged from service. All such laws and regulations must be declared void whenever they [37] are brought to the test of judicial scrutiny, State or national. It is equally apparent that it is the duty of the respective States to make laws and regulations for the faithful observance of this compact. They have generally done so, and doubtless would have continued so to do, but for the decision of the United States Supreme Court in the case of *Prigg v. The Commonw. of Penn.* It is still their duty so to do."

Afterwards, in considering the meaning of the word *claim*, he says, p. 39, "the State whose duty it is to deliver up the fugitive when the fact is determined."



§ 771. In the same Opinion, on pages 37-43 of the report, Judge Smith examines the meaning of the term *claim* and the effect of the guarantees in the amendments to the Constitution as being against the doctrines of seizure and removal under the provision alone, and against a trial by Commissioners as provided under the law of 1850, and against a summary trial, by any judicial officers, without jury. This portion of the Opinion will hereinafter be cited. He then proceeds to an examination of the decision of the Supreme Court in *Prigg's case*.<sup>1</sup> This portion of the Opinion, from pp. 43-47 of the report, is given in the note below.

<sup>1</sup> 3 Wisc. 43. "I ought not to dismiss the consideration of this question, without particularly adverting to the case of *Prigg vs. The Commonwealth of Penn.*, 16 *Peters' Rep.* 540. The opinions in the other cases cited, are so conflicting, casual, or incidental, as to be of no force; and in the case of *Prigg vs. Penn.*, it may be justly remarked that the discrepancy of opinion among the members of the court, was so wide and fundamental, as greatly to impair the authority of that decision. It affirms the constitutionality of the act of 1793, upon contemporaneous exposition, in one respect, and expressly [44] defies the same rule in another, for it pronounces the act constitutional in part, and unconstitutional in another part. Whatever of authority may attach to it in consequence of the character and eminence of the men who passed it, and of him who signed it, is effectually counteracted by the decision of the court that in one part of it, at least, the constitution was violated. Contemporaneous construction confers the power of legislation and execution upon the States as well as Congress; for, long before Congress assumed to act upon the subject, the State legislature had passed laws in fidelity to the compact, in most of which some of the framers of the Constitution had seats, and all of the slave States, and all or nearly all the free States continued to exercise the power up to a very recent period.

"Contemporaneous history, contemporaneous exposition, early and long continued acquiescence, all go to show the interpretation given to this provision of the Constitution by the States and the people. The slave States passed acts to execute the compact. The free States did the same. The action of the several States, or many of them, shows conclusively that they interpreted the provision as a compact merely addressed to the good faith of the States. The slave States appealed to the free States for legislative action to carry into effect this provision of the federal Constitution, and demanded of the latter the stern exercise of a power which it is now sought to wrest from them. In 1826, the State of Maryland appointed commissioners to attend upon the session of the legislature of Pennsylvania and induce the latter to pass an act to facilitate the reclamation of fugitive slaves. Their mission was successful. Pennsylvania yielded to the solicitations [45] of Maryland's commissioners, and passed the act of 1826, which was afterwards declared void by the Supreme Court of the United States in *Prigg vs. Penn.* In 1836 or 1837, similar commissioners were appointed by the State of Kentucky to the State of Ohio, whose mission resulted in the passage of a most stringent fugitive act by the legislature of Ohio. So, also, about the same time, in regard to Indiana and I believe Illinois. Up to 1837, the States esteemed it their duty, and slave States demanded its performance, to provide by law, for the execution and faithful observance of this compact. All seemed to regard it as a compact and nothing else; binding, it is true, and operative as law equally upon all, but still a compact, and a compact only.

"Again, it is respectfully suggested, that the whole argument of Mr. Justice Story is based upon what is sometimes called the *petitio principii*. He assumes

§ 772. The introductory portion of the second Opinion (3 Wisc. 87-96) contains a further definition of his position as a State judge, in view of the decisions of the Supreme Court of the United States, and an assertion of *co-ordinate* State-judicial power to decide the question according to his own understanding of the Constitution as the highest law, and that a State

that the Constitution makes it the duty of the federal government to enforce the right of the owner secured by the compact, and then infers that it must necessarily have the power, and then, if Congress has it, the States cannot have it.

"All admit that there is no express power in the Constitution to legislate upon this subject, but it is claimed to be necessarily implied, as incidental to the grant of judicial power. The reclamation of a fugitive is first decided to be a 'case' arising under the Constitution of the United States, and hence within the judicial power. But this mode of implying powers can never be sustained. The judicial power is extended in several respects beyond the legislative power. The judicial power has jurisdiction in cases arising between the citizens of different States. A citizen of [46] New York may sue a citizen of Wisconsin, upon a promissory note, bill of exchange, covenants in a deed, in partition of real estate, or even in ejectment for the possession or title to lands. If a power of legislation may therefore be grafted by implication upon a judicial power, Congress may assume the whole power of legislation over these subjects in the respective States, and necessarily exclude State legislation, and accomplish at a blow the complete prostration and overthrow of the State sovereignty. Other illustrations might be given to manifest the danger of engrafting a legislative power upon a judicial, by implication. This was tried at an early day, and by the same course of reasoning, common law jurisdiction was claimed for the courts of the United States, and power of legislation over all common law subjects, claimed by implication in Congress. The Alien and Sedition laws were chiefly defended on these grounds.

"On the contrary, Chief Justice Taney, in his dissenting opinion, though he admits the right of Congress to legislate, but does not argue it, thinks the compact peculiarly enjoins the duty upon the States.

"Again, this case explicitly decides the claim of the owner to a fugitive slave to be a 'case' within the meaning of the Constitution; hence it is a suit, not in admiralty, or equity, and hence at common law, within the meaning of the Constitution. It also decides the determination of the claim to be a *judicial* proceeding, and bases the power of the federal government in the premises, upon the grant of judicial power, and the power of legislation is assumed to be incidental to that. All these points, which are held to be *res adjudicata*, strike at the very vitality of the act of 1850, which attempts to confer such judicial [47] power upon Commissioners. Time will not permit a further review of this case. In my judgment the opinion of the Chief Justice completely overthrows that of the Court, and so far as he attempts to argue his points, beyond doubt or controversy, establishes the doctrine here contended for.

"In view of the dissentient opinions of the members of the Supreme Bench; in view of the discrepancy of opinion which has characterized all other decisions wherein the question has been raised and argued; in view of the fugitive character of the power here claimed by Congress, leaping from article to article, from section to section, and from clause to clause, hovering now over a grant, then over a compact, fluttering now around an implication, then around an incident, to find whereon it may rest its foot; in view of the alarm which has seized upon many of the States in consequence of the enormous power which it has called upon Congress to assume in its behalf, and the deep wounds which it seeks to inflict upon the rights and sovereignty of the States, and upon the great principles of human freedom; in view of all this, are we not justified in asking of the Supreme Court of the United States to review their decision as the majority pronounced it in the case of *Prigg vs. Commonwealth of Pennsylvania?*"



judge is not bound by doctrines expressed by the national judiciary in *analogous* cases. On p. 95 the judge refers to the proposition advanced, "that this court is bound absolutely by adjudications in analogous cases upon an analogous statute by the decisions of the Supreme Court of the United States; that to the decisions of that court we are bound to yield as to the decisions of a conceded appellate tribunal, with a 'dignified judicial subordination,'" and says, "I cannot yield my assent to the proposition. I do not so understand the relations of the respective courts. Especially," &c., in cases involving the right of personal liberty.

Judge Smith then, on the same page, proposes to recur to the fundamental principles of our government, "to refer to what would seem an obvious and primary principle by which the federal compact is to be interpreted, and, for this purpose, to look to the origin as well as the consummation of the system of government established thereby, viz.: the *source* of the federal power and the *extent* of the power derived." Judge Smith gives his views of the location of ultimate sovereign power under the Constitution. His view is that the States severally, or the several people of the several States, each being severally possessor of the sum of the powers of a national sovereignty, were the constitutors of the United States, and that there is no integral people of the United States.<sup>1</sup>

Applying, to the construction of the provision, his conception of the constituting People of the United States, Judge

<sup>1</sup> See pages 96-100. This part of the Opinion may vindicate that examination of this question which was attempted in the eleventh chapter of this work. On page 96, Judge Smith says:—"The Constitution of the United States is, in its more essential and fundamental character, a *tri-partite* instrument. The parties to it are THE STATES, THE PEOPLE, and THE UNITED STATES. The latter is, indeed, a resulting party, brought into existence by it, but when thus created, bound in all respects by its provisions. It is practically represented by its several departments, deriving their powers directly and severally through its respective grants. It is derivative, not original. Previous to the operative vitality of the Constitution, this third party to the instrument was non-existent, and of course powerless. The other two parties, the States and the People, were pre-existent, endowed with all the essential elements of sovereignty." Judge Smith thinks that no one will "pretend that the people of the confederated States created the present federal government in their capacity of a primary and ultimate source of political power, operating to institute a new and original government," and that "to have done this, they must have necessarily first dissolved the State governments under which they were then living and acting, and absolved themselves from allegiance thereto." The reader may compare with this the argument, *ante*, §§ 339-346.

Smith regards *the States* as the persons bound by the rule contained in it. In this he agrees with the majority of the justices in *Prigg's* case. He begins to disagree with them in denying that from this view of the Constitution a power in the national Government, to apply or enforce that rule, is to be inferred. It appears, therefore, that Judge Smith adopts the first of the four constructions hereinbefore stated as possible.<sup>1</sup>

<sup>1</sup> On page 100, Judge Smith says:—"What power or authority did the States relinquish by this clause? At most, the right, and power, if you will, to enact any law or regulation by which such escaping fugitive shall be discharged from such service or labor. They also covenanted that the fugitive should be delivered up. But did they delegate to the federal government the right to enter their territory and seize him? Did they authorize that government to organize a police establishment, either permanently or temporarily, armed or unarmed, to invade their territory at will, in search of fugitives from labor, ranging throughout their whole extent, subject to no State law, but enjoying a defiant immunity from all State authority or process, while executing their mission? Did the States relinquish the right or power to prescribe the mode by which they would execute their own solemn compact, [101] in delivering up the fugitive? Did they, by assenting to this provision, suppose that they were yielding assent to the proposition now assumed as the basis, or at least the excuse, for federal interference, that they were incapable, from moral obliquity or otherwise, of executing the compact themselves? and therefore to preserve a remnant of fidelity, they would deposit this trust with the general government? The whole history of the clause in question precludes such hypothesis. The clear, indubitable construction of the words precludes it. A just conception of the relative powers of the two governments, before stated, precludes it. Every just regard to dignity and self respect on the part of the States forbids it. Every sentiment of delicacy, not to say justice, on the part of the national functionaries should revolt at it. But the contrary is the fact, as asserted, I would, if I could say, implied, by the tenor of the argument; and these assumptions, so derogatory to the good faith of the States, so repugnant to the theory of our system of government, so irreconcilable with the principles of the whole structure, prostrating the creators at the feet of the creature; disrobing the States, the sources of power, of almost every characteristic of integrity and virtue, and exhibiting the federal government as the only safe depository of those attributes; are not only made the foundation of legal argument, but they claim to be based upon judicial authority, absolutely controlling all official duty, requiring absolute and unqualified submission on the part of the States whose patriotism and good faith are thus impugned, and demanding 'a dignified judicial subordination' on the part of the State courts, in order to 'maintain the rule of judicial [102] order *stare decisis*' as established in the case of *Prigg vs. Pennsylvania*. 16 *Peters' Rep.* 520.

"Nor are these assumptions unsupported by the opinion of the court in that case, to which obedience is invoked. On the contrary, they include and form the very groundwork of the decision, as a few extracts from the opinions of the judges will show. Mr. Justice McLean says, 'If the effect of it' (the clause in question) 'depended in any degree upon the construction of a State, by legislation or otherwise, its spirit, if not its letter, would be disregarded.' (16 *Pet. Rep.* 622.) Not mere waywardness to the State legislatures is here imputed, but contempt of constitutional obligation; imputed, not only to the legislatures, but to the courts likewise. Be the imputation what it may, the argument is, that because the State functionaries are unfaithful to their constitutional duties, therefore the federal officers must take upon themselves their performance.

"Again, page 661, Mr. Justice McLean says, 'The States are inhibited from passing any law or regulation which shall discharge a fugitive slave from his



He treats as an absurdity the doctrine which he attributes to Story, Wayne, and McLean, that the States are to be supposed to have solemnly agreed to perform a certain act, and by the very same act to have given the national Government a power

master, and a positive duty is enjoined *on them* to deliver him up.' He goes on to show the necessity of the provision, and then asks, 'Now, by whom is this paramount law to be executed? It is contended that the power rests with the States. The law was designed to protect the rights of the slaveholders against the States opposed to their rights; and yet, by this argument, the effective power is in the hands of those on whom it is to operate.' 'This would produce a strange anomaly in legislation. It would show an inexperience and folly in the venerable framers of the Constitution, from which, of all public bodies [103] that ever assembled, they were, perhaps, the most exempt.'

"Was it folly in the framers of the Constitution to 'enjoin a positive duty upon the States to deliver up the fugitive' and also to leave them the adequate power to fulfill that duty? This 'paramount law' 'enjoins a positive duty' upon the States, and yet in answer to the question 'by whom it is to be executed?' it is asserted that it would show inexperience and folly to leave the party, upon whom a duty is enjoined, the power to perform it. Would it not rather show most consummate folly, to enjoin the performance of a positive duty upon the States, and at the same time deprive them of all power to execute it 'by legislation or otherwise?' A 'positive duty is enjoined' and yet it is consummate folly to leave 'the effective power' to perform that duty in the hands of those upon whom it is enjoined! Is it supposable that the States would enjoin upon themselves a positive duty, and then voluntarily relinquish all power to perform it? The learned judge is doubtless correct in saying that a positive duty is enjoined upon the States. Concede this, and it irresistibly follows that the power to perform it remains with the States. Mr. Justice McLean must either retract from his position that a duty is enjoined upon the States, or abandon his position that they have no power to execute it by legislation or otherwise. Both cannot stand. It is immaterial which is surrendered, one is worthless without the other, and the assertion of the one is fatal to the other. A 'positive duty is enjoined upon the States to deliver up the fugitive,' yet, if left to the States to provide for its performance, or directly perform it, 'by legislation or otherwise,' the letter [104] or spirit of the injunction would be disregarded; but take away all power to execute the injunction and its fulfillment is secured!"

Judge Smith next, on p. 104, quotes certain passages from Story's Opinion in *Prigg's case* (16 Peters, 614, 623, 624, 612, 613), and says, "Here is the same assumption of State infidelity which pervades the reasoning of the whole case. The States will not execute their own covenant, and therefore the federal government will execute it for them." Then citing passages from Wayne's Opinion (16 Peters, 646, 647, 648), "In all these passages the necessity of federal legislation and consequent judicial action is urged upon the assumption that the States will not, and, therefore, the federal government should carry into effect this provision of the Constitution; imputing infidelity to the former, and claiming exclusive fidelity in this behalf for the latter."

"But I will not pursue this subject farther. It is not pretended that there is any direct grant of power to the federal government in this clause, nor that it is incidental to any other grant. But it is assumed, first, that a duty is required of the States to be performed, and because it is apprehended that the States will not perform it, therefore the federal government may, and even ought to perform it. Once admit this rule of interpretation, and the blindest cannot but perceive that Congress may, as occasion shall seem to suggest, assume the entire duty of local legislation for the States, and that the whole power of internal police of the States may be usurped by the respective departments of the general government."

to perform that act in their place and stead, by allowing it to be assumed that they would not perform their agreement.

Judge Smith appears to have misapprehended the construction of this provision upon which Judges Story and Wayne based the legislative power of Congress. It has been shown (*ante*, §§ 754, 762) that these judges did not support the second construction; though there is much in the Opinions delivered by them which is consistent with that view.

In the same Opinion, on pages 107-110, Judge Smith then examines the position taken in the Opinions delivered by Judges Story and Wayne in *Prigg's* case, that to require the owner of a fugitive slave to make a claim for him before any public authority would be "a discharge *pro tanto*." He then, on pages 110-115, excepts to the jurisdiction of the United States Supreme Court in *Prigg's* case. From this portion of the Opinion some sentences have been noted, *ante*, pp. 456, 459. On pages 115-125 Judge Smith again controverts the interpretation given to the provision, in that case, under which the owner is allowed to seize and remove the slave as property.

He then,<sup>1</sup> on pages 125-131, argues that the United States

<sup>1</sup> 3 Wisc. 125. "It cannot be necessary to refer specifically to the repeated adjudications by which the Supreme Court of the United States have declared the rules of construction of the Constitution, viz.: that the federal government is one of limited powers; of powers delegated, not inherent; that it can exercise no power unless expressly granted or necessarily implied; that the federal government was endowed with no power but such as is expressed or necessarily incident to the execution of some express power; that all powers not delegated, expressly or by implication, or necessarily incident to some express power, were reserved to the States and to the people;—they are known to every student of the Constitution. (See *Martin vs. Hunter's Lessees*, 1 Wheat. 326; *Story's Con.* § 1238 *et seq.*; 1 *Kenl's Com.* 388, 390; *Gibbons vs. Ogden*, Wheat. 203; 4 Wheat. 122; 5 Wheat. 1; 2 Dall. 386; 2 Wheat. 259; 3 Wash. C. C. Rep. 316, 322; and cases there cited.) Yet the rule sought to be established by this decision is that reservations and restrictions in behalf of the States are to be expressed, and not grants or relinquishments in behalf of the federal government; that in the absence of restriction, positive and unqualified right or power is to be inferred; that because the States and the people thereof have parted with some of the attributes of their proper sovereignty, therefore they have parted with all which they have not expressly reserved!

\* "These are the grounds upon which the doctrine of *Prigg vs. Penn.* is based. They are not inferences or deductions from the doctrine, but premises without the recognition of which, not one step towards the conclusion can be taken."

After alluding again to the consequences which must follow from admitting that the rights of ownership exist in the State in which the fugitives may be found "to the same extent" as in the State from which he escaped, Judge Smith proceeds, on p. 127:

"Having declared the right of the slave owner to the extent before stated in the remarks of the court quoted, the court go on to say, 'If indeed the Constitu-



Supreme Court's construction of the provision is a violation of rules sanctioned by its own previous decisions. This portion of the Opinion bears on the question here considered, and is given in the note below.

tion guarantees the right, and if it requires the delivery upon the claim of the owner (as cannot be well doubted), the natural inference certainly is, that the national government is clothed with the appropriate functions and authority to enforce it."

"The simple answer to this is, that the Constitution does not guarantee the right. It *guarantees* no right. No power is granted in the Constitution to the federal government to enforce or guaranty any right in regard to fugitive slaves, or any other slaves. The Constitution expresses a simple inhibition on the one hand, and enjoins a simple duty on the other. The inhibition on the States, is, not to discharge the fugitive by any State law or regulation; the duty enjoined upon the State is, to deliver him up on claim, &c. An inhibition upon the States is not a grant of power to the United States. A duty enjoined upon the States, cannot be construed into a grant of power to the United States, to do the same thing in case the States do not. The States are inhibited from passing any law impairing the obligation of contracts, but *because* the States are thus inhibited, it cannot be contended that the federal government may do so. So far from it, that an express power was invoked and incorporated in the instrument enabling Congress to provide for a uniform system of bankruptcy. The duty of electing senators is enjoined upon the State legislatures by the Constitution of the United States; [128] but because this duty is enjoined by that instrument, will it be pretended that if the States do not perform it, the United States may? and thereby assume to the United States Senate the power to fill vacancies which may occur in that body? Yet this is the doctrine of the Supreme Court of the United States in the case of *Prigg vs. Pennsylvania*.

"The court say, in continuation of the paragraph just quoted, in illustration and enforcement of their doctrine: 'The fundamental principle, applicable to all cases of this sort, would seem to be, that where the end is required, the means are given; and when the duty is enjoined, the ability to perform it is contemplated to exist on the part of the functionaries to whom it is entrusted. The clause is found in the national Constitution, and not in that of any State.' Mr. Justice McLean, who concurred in the main opinion of the court, that the power of legislation was vested exclusively in Congress, and wrote a separate opinion to strengthen it, says that a positive duty is enjoined upon the States to deliver up the fugitive, and the court say that because the clause is found in the national Constitution and not in that of the States, the federal functionaries must perform it, and the State functionaries cannot; still the duty is enjoined upon the States, and when the duty is enjoined, the ability is contemplated to exist on the part of the functionaries to whom it is entrusted; nevertheless, though entrusted to the State functionaries, and the ability to perform it contemplated to exist on their part, it does not exist at all, and the States and their functionaries have no authority in the premises. Such is *Prigg vs. Penn.*, decided *pro forma* in a State court, and jurisdiction assumed in the Supreme Court of the United [129] States, 'to put these agitating questions forever to rest.'

"The clause is found in the national Constitution, and not in that of any State. It does not point out any State functionaries, or any State action to carry its provisions into effect. The States cannot, therefore, be compelled to enforce them, and it might well be deemed an unconstitutional exercise of the power of interpretation to insist that the States are bound to provide means to carry into effect the duties of the national government, no where delegated or entrusted to them by the Constitution.'

"What inference can be legitimately drawn from the fact that the clause is found in the national Constitution, in favor of a grant of power to the federal government, it is difficult to perceive. Many, very many clauses are found there

§ 773. It appears then that of the three members of the Court, Chief Justice Whiton and Judge Crawford may have supported the second, third, or fourth construction of the provision as the basis of the power of Congress, and that Judge Smith, denying the power, supported the first construction.

§ 774. Booth, having been discharged on this occasion from the custody in which he had been held under the warrant of the U. S. Commissioner, was afterwards committed, to

which confer no power, some which do, some which restrict, and some which inhibit its exercise. Because it is found there, and nowhere else, it does not follow that the national government shall enforce it. On the contrary, the acknowledged rule of interpretation is, that it cannot exercise any power but such as is expressly or impliedly delegated, and that where this is not the case, the power of execution is reserved to the States or to the people. If the clause does not point out any State functionaries, or any State action to carry its provisions into effect, neither does it point out any national functionaries, or any federal action for the same purpose; hence, according to the rule of interpretation, before stated, if it did not point out national functionaries, or federal action, the same were reserved to the States and the people thereof. There would have been a manifest impropriety in attempting [130] to prescribe the mode and State functionaries by which this duty that the States voluntarily bound themselves to observe, should be executed. It would have been as gross an impeachment of their integrity and honor, as is the decision of the court in this case. It would have been treated as the unworthiness of the suggestion had merited. But if the clause had contemplated federal action, what would have been more appropriate, than to point out the mode by which it was to be exercised, or to designate the federal functionaries who were to execute it. Indeed, it is inconceivable, that the convention should have contemplated the execution of this clause by the federal government, and should have prescribed no mode of execution, nor even grant any power to prescribe one; especially, when just before they had perceived the necessity of such grant in regard to the faith and credit to be given to public records of the States, and made the grant accordingly.

"The vice of this sort of reasoning on the part of the court, is, that it begs the very question which it assumes to prove. It is assumed, that upon the national government is imposed the duty of delivering up the fugitive; then, because the duty is imposed, the means of performing it necessarily exist. But the duty is not imposed upon that government; and the members of the court who concurred in the opinion were obliged to abandon this fundamental position, and admit that the duty is enjoined upon the States. Then, according to the majority opinion, 'when a duty is enjoined, the ability to perform it is contemplated to exist,' a majority of the judges will be found, upon analysis, holding that the duty and the power, both rest with the States. These are inconsistencies [131] which it is difficult to follow and obey, even 'to preserve the rule of judicial order *stare decisis*,' or 'to maintain a dignified judicial subordination.'

"The very fact, therefore, that the clause does not point out any federal functionaries, or any federal action to carry its provisions into effect, is a conclusive argument, that State functionaries, and State action, are the only constitutional means of its execution; because all agencies, powers, and processes not granted to the federal government, or some department thereof, are reserved to the States and to the people. And for the court to assume, that federal authority is to be presumed in all cases when State functionaries are not pointed out, is a gross usurpation, and a flagrant violation of all settled rules of construction, and a palpable violation of the express provisions of the tenth amendment of the Constitution itself."



answer the indictment found against him in the District Court, under a warrant issued by Judge Miller, of that court. On the 21st July, 1854, application for a writ of habeas corpus on his behalf was made to the Supreme Court of the State. The writ was refused by the court, Judges Whiton and Smith, who decided that since it appeared from the petition that the question of the liberty of the prisoner was then pending before another judicial tribunal, the State court would not interfere by the writ. *Ex parte Sherman M. Booth*, 3 Wisc. 145.

§ 775. On trial of the indictment in the U. S. District Court, Booth and Rycraft were sentenced to punishment by fine and imprisonment. A writ of habeas corpus issued on petition, from the Supreme Court of the State, Jan. 23, 1855, and on hearing counsel for the prisoners (the U. S. Attorney not appearing) they were discharged on the ground that the copy of the indictment and record of conviction returned by the Sheriff showed that the District Court had no jurisdiction, and that the conviction was void, and the imprisonment illegal. *In re Booth and Rycraft*, 3 Wisc. 157. In this decision the three members of the court concurred. Chief Justice Whiton and Judge Crawford maintained this decision without reference to the question of the constitutionality of the Act of Congress, and the latter Judge, it will be remembered, had, in the case of *Ableman v. Booth*, held the act to be constitutional.<sup>1</sup> Judge Smith agreed with the other judges that the insufficiency of the record to show that the prisoner had been convicted of a crime within the jurisdiction of the District Court was sufficient ground for his being set at liberty. But he also held that the nullity of the conviction by reason of the unconstitutionality of the law of Congress was sufficient ground for discharging the convicted prisoner.

§ 776. In the Supreme Court of the United States, December term, 1858, the judgments of the Supreme Court of Wisconsin, in *Ableman v. Booth*, of June term, 1854, and *Ex parte Booth* of December term, 1854, were argued, together, on the part of the United States, no counsel appearing for the defendants in error, and were together reversed by that Court.<sup>2</sup>

<sup>1</sup> *Ante*, p. 504.

<sup>2</sup> *Ableman v. Booth* was carried up to the court by writ of error with the

Chief Justice Taney, delivering the Opinion of the court, *Ableman v. Booth*, and *United States v. Booth* (21 Howard, 506), discusses exclusively the question raised in the second of these cases, of the authority of a State court to examine the lawfulness of custody under the decree of a United States judicial tribunal. He does not distinguish it from the question raised in *Ableman v. Booth*, of the authority of a State court in reference to imprisonments under color of the authority of the United States and not by the authority of a United States court. The Opinion appears to deny State jurisdiction equally in either case.<sup>1</sup>

usual return of the clerk and a certificate of the State court. It was submitted to the judgment of the U. S. Supreme Court, by the defendant, on "the reasoning in the argument and opinions in the printed pamphlet therewith sent." 21 Hew. 509. To the writ of error issued in the second case, *United States v. Booth*, returnable before the Supreme Court of the U. S., the clerk of the Wisconsin Supreme Court made no return, having been directed by the State court to make none, and to "enter no order upon the journal and records of the court concerning the same." But after service on the same clerk of an order to make the return, and proceedings had before the U. S. Supreme Court (*U. S. v. Booth*, 18 Howard, 476, and 21 Howard, 512), the copy of the record filed by the Attorney General was received and entered on the docket, "to have the same effect and legal operation as if returned by the clerk with the writ of error."

<sup>1</sup> It has been shown in the first Vol., pp. 494, 495, that the State courts have generally claimed the right to inquire into the lawfulness of every detention of persons under color of the authority of the United States. It should, perhaps, have been there added that it is generally understood that every detention shown to be under process, order, or judgment of a U. S. court, is by the State court deemed lawful; even though that court may be of opinion that the U. S. court had erred in its action. The remedy against such error is supposed to be in the revisory action of the U. S. judiciary. The doctrine generally received is, therefore, that the State courts inquire into the lawfulness of custody under color of authority of the United States, when not shown to be under authority of some United States court. Some judges of United States courts have denied the right of the State judiciary even when thus limited. (See Judge Nelson's charge, *ante*, I. 496.) It appears to be denied by the U. S. Supreme Court, by their decision in *Ableman v. Booth*, since the court does not rest its decision of that case on the constitutionality of the law of 1850.

On the other hand, the doctrine of the Supreme Court of Wisconsin in *Ex parte Booth* and *Rycraft*, seems to be new. Taney, Ch. J., says, 21 Howard, 513, that in this case "the State court has gone a step further" than in *Ableman v. Booth*, "and claimed and exercised jurisdiction over the proceedings and judgment of a District Court of the United States, and upon a summary and collateral proceeding, by *habeas corpus*, has set aside and annulled its judgment and discharged a prisoner who had been tried and found guilty of an offence against the laws of the United States, and sentenced to imprisonment by the District Court. And it further appears that the State court have not only claimed and exercised this jurisdiction, but have also determined that their decision is final and conclusive upon all the courts of the United States, and ordered their clerk to disregard and refuse obedience to the writ of error issued by this court pursuant to the Act of Congress of 1789, to bring here for examination and revision the judgment of the State court. These propositions are new in the jurisprudence of the United States as well as of the States; and the supremacy of the State courts over the



The judgment of the State court in *Ableman v. Booth* appears to be reversed by the Supreme Court on this ground alone, without reference to the question of the constitutionality of the law of 1850. But in the conclusion of the Opinion (21 How. 526), Judge Taney says:—"But although we think it unnecessary to discuss these questions, yet, as they have been decided by the State court and are before us on the record, and we are not willing to be misunderstood, it is proper to say that, in the judgment of this Court, the Act of Congress commonly called the fugitive Slave Law, is, in all its provisions, fully authorized by the Constitution of the United States."

§ 777. In *Ex parte Bushnell* and *Ex parte Langston*, 9 Ohio, 76-325, the constitutionality of the Acts of Congress was sustained by Swan, Chief Justice, with Judges Peck and Scott; Judges Brinkerhoff and Sutliff dissenting. Judge Swan, *ib.* 185, states:—"The question before us is, whether the seventh section of the fugitive law, under which these relators were sentenced, is a nullity, for want of legislative power in Congress to pass any law whatever relating to fugitives from labor." In his Opinion he maintains the power to be in Congress; but solely on the authority of the earlier cases<sup>1</sup> in the

courts of the United States in cases arising under the Constitution and laws of the United States is now for the first time asserted and acted upon in the Supreme Court of a State."

An examination of these questions of concurrent and conflicting jurisdiction does not come within the proposed limits of this work. The law on the writ of habeas corpus in these cases has been set forth with great completeness by Mr. Rollin C. Hurd, of Ohio, in his recent work on Personal Liberty and the writ of Habeas Corpus, 164-207. The question raised by the case of *United States v. Booth*, is intimately connected with, if it does not directly depend upon, the question considered in the eleventh chapter—the true theory of the location of sovereign powers held by the States and the Government of the United States, as is illustrated by Judge Smith's reasoning in 3 Wisc. 190, which is based upon the extreme of one of the theories referred to in Vol. I. p. 408, note, and which was formerly advocated principally by the Southern State's-Rights school.

<sup>1</sup> I am informed by A. L. Collins, Esq., of the Wisconsin bar, that on the remittitur of this case from the Supreme Court of the United States to the Supreme Court of Wisconsin, the U. S. Dist. Atty. moved that it be received and filed. The motion was argued before Judges Cole and Dixon. Judge Cole adhered to the position taken by the court on the former occasion (*ante*, p. 521, note 2). Judge Dixon held that the Supreme Court of the United States had appellate jurisdiction, and that the remittitur should be received and filed. On this division the motion failed. A statement of the grounds of his opinion is said to have been published by Judge Dixon, about February, 1860.

<sup>2</sup> In this Opinion Judge Swan elaborately maintains the doctrine that the decisions of the Supreme Court of the United States in respect to the distribution of sovereign power between the States and the national Government bind the State

national and State courts, and on general acquiescence in the law of 1793, particularly in reference to fugitives from justice. (9 Ohio, 186-191, 197, 198.) His argument, therefore, throws no light on the question of construction here considered, nor in relying on Prigg's case does Judge Swan indicate what construction of the provision he would find given by the Supreme Court of the United States; except by saying, on *ib.* 186:—"That court have held unanimously, that, inasmuch as the Constitution of the United States secured by express provision the right to the reclamation of escaped slaves, the obligation to protect and enforce that constitutional right devolves upon the general government." This statement of the doctrine does not indicate whether the right is, in the first instance, correlative to a duty on the part of the States, which the national

courts in cases subsequently occurring; that there is no alternative between this doctrine and a forcible collision between the State courts and the national authorities. (See particularly 9 Ohio, 195.) This doctrine should be distinguished from that recognition of the supremacy of the Supreme Court of the United States to determine the rights and obligations of private persons in the cases which actually *are before it for adjudication* which is made in the earlier part of this work (Vol. I, pp. 428-432). The doctrine there intended is that, where the question is of the possession of sovereign power, the judiciary cannot determine it for future cases; the national executive and legislative departments in their action and the several States in all their departments must still interpret the Constitution according to their convictions—subject always to the power which the national judiciary has over the question when it arises in the application of law between individual persons. This seems to be Judge Sutherland's doctrine in this case. (9 Ohio, 318.) The contrary doctrine destroys the independent action of the three functions of power, in the one case, and, in the other, renders State power a thing by permission and State sovereignty a name. It is morally certain that a series of decisions, without flaw of jurisdiction, supported by opinions consistent with themselves and with other expositions of the same tribunal and recognized by a majority of State authorities, will work the practical settlement of any such question. But any number of cases should not determine, if the majority rest on some one or two decisions, and if these were exceptionable in jurisdiction or derived "through the medium of reasonings lame, halting, contradictory, and of far-fetched implications, derived from unwarranted assumptions and false history." (Brinkerhoff, J., 9 Ohio, 227.) Judges Swan and Peck also seem to think that if a State court concludes against the constitutionality of a law of Congress, it must repudiate the authority of the Supreme Court to determine the rights of the parties in the particular case. This was apparently also the doctrine of the Wisconsin court in Booth's case, in refusing to certify their record. This is the other extreme. The true doctrine is, I think, that the State court must acknowledge the appellate jurisdiction of the United States judiciary and submit to its judgment, in the particular case. It is not for the State judiciary to force the State Government or the people of the State to resist the assumption of power by the national Government. The right of doing this rests, if anywhere, with the legislature or with "the people" of the State in Convention. The supposable instances of practical usurpation do not invalidate the doctrine. There are difficulties practically attending on any solution of such a question.



Government is to enforce by acting in their stead (the second construction), or a right correlative to a duty on the part of the national Government, of which duty Congress merely indicates the performance (the third construction), or a right correlative to obligations of the fugitive and all third parties, arising under private law contained in the Constitution (the fourth construction).<sup>1</sup>

No Opinion was delivered by Judge Scott on this case. Judge Peck, in his Opinion, reviews the cases at length, and relies altogether on them as controlling authority. He even expresses a doubt whether, if the question were then newly raised, the court could recognize the power in Congress.<sup>2</sup> His observations throw no light on the question of construction.

§ 778. Judge Brinkerhoff, dissenting, said, *ib.* 223:—"These relators ought to be discharged, because they have been indicted and convicted upon a subject-matter in reference to

<sup>1</sup> Judge Swan then enumerates the grounds taken against the power of Congress: among these one which does not commonly appear in the reports. Others, he says, insist "that the amendment to the Constitution which secures freedom of religious belief makes the provision in relation to the reclamation of slaves subordinate to it, and, by implication, of no obligation upon those who believe slavery a sin." No such objection appears in the argument for the relators in this case by Mr. Wolcott, the State's Atty. General.

<sup>2</sup> 9 Ohio, 211. "If the question were now *res integra*, and we, unaided by the history of the constitutional provision, and uninformed as to the previous decisions, long-continued use, and contemporaneous exposition, were now called upon, for the first time, to determine the precise effect of that provision and the power of Congress over the subject, it is probable that, giving a strict construction to the Constitution and the powers conferred by it, we might hold that Congress had no authority to legislate as to the reclamation of fugitives from service. But when we look," &c. But on p. 201, Judge Peck says that, "A careful perusal of the 'History of the Origin and Formation of the Constitution,' etc., by Curtis, and the supplement to Elliott's Debates, will satisfy every one at all familiar with the history," &c., that this provision "was deemed by many of the members, and those they represented, of great, if not of vital importance, and contributed largely to its adoption by some of the Southern States. He will also be satisfied that, if any legislation was required, in order to carry the provisions of that clause into effect, the framers of that instrument could not, from the nature of the interests involved, the difficulties before that time encountered, and those which might reasonably be anticipated in the future, have designed or intended to commit such necessary legislation to the States. Interpreting this clause in the light of the surrounding circumstances, he could entertain no doubt but that this clause had a material effect in procuring the adoption of the Constitution, and that all necessary legislation in regard to it ought to have been, and was by them supposed to be, committed to the national and not the State legislatures." This is a very perfect specimen of that method of expounding the Constitution, which was denounced by Judge Baldwin, in a passage cited in the preface of this work, p. ix. It is a fair counterpart to the supplementary canon which Judge Story introduced in *Prigg's* case (*ante*, p. 461).

which Congress has, under the Constitution of the United States, no legislative power whatever. As to the correctness of this proposition, there does not rest in my mind the shadow or glimmer of a doubt.<sup>1</sup> The federal government is one of limited powers," &c. Then, reciting the provision, "This is the only clause of the Constitution from which any body pretends to derive, or in which any body pretends to find a grant of power to Congress, to legislate on the subject of the rendition of fugitives from labor. I can find in it no such grant. The first part of it simply prohibits State legislation hostile to the rendition of fugitives from labor. Such fugitive shall not be discharged 'in consequence of any law or regulation' of the State into which he shall escape. 'But shall be delivered up.' By whom? By Congress? By the federal authorities? *There are no such words*; and no such idea is hinted at. This is evident from an inspection of the whole of the preceding portion of this article." Then reciting Art. 4, sec. 1, and the grant of power to Congress to legislate for the proof and effect of acts, &c., Judge Brinkerhoff says, "When they intended a grant of power to Congress, and not a mere contract stipulation by an injunction of duty upon the States, *they say so*, and leave us no room for cavil on the subject." Then citing the first two provisions of the second section, on privileges, &c., of citizens, and delivery of fugitives from justice, he says, "That these clauses are mere articles of compact between the States, dependent on the good faith of the States alone for their fulfillment, I suppose no one will dispute. They do not confer upon

<sup>1</sup> Admitting that Congress had no power to pass the law, the question was still presented, Have the State courts power in any case to set at liberty persons in custody under judgment of a court of the U. S.? The decision of the Ohio court may have been proper, on the ground that they have no such power, and that the only remedy was in an appeal from the District Court to the Circuit Court, and to the Supreme Court of the U. S. But the judges did not so view their position. Judge Sutliff (p. 229) says, "We all agree that if the Act of Congress, under which the relators have been convicted, is unconstitutional, their imprisonment is illegal, and they ought to be discharged." The same doctrine was held in *re Booth* and *Rycraft*. See particularly Ch. J. Whiton's note, 3 Wisc. 176, 177. In this Judge Crawford concurred. In the earlier part of this work (Vol. I, p. 493-495) it was argued that State courts may inquire into the validity of a custody by administrative or ministerial officers under color of the authority of the U. S. But it was not intended to affirm that they would not be bound to recognize the custody if under the judgment of a court holding the judicial power of the U. S., even when in the judgment of the State court the subject-matter is not within the judicial power of the U. S.



Congress any power whatsoever to enforce their observance." The judge then argues the want of power from the express grant of power, in respect to proof of acts, &c., in the first section. He urges that these provisions are substitutes for similar clauses in the Articles of Confederation which "contained *nothing but* articles of compact," and in the "articles of compact" of the ordinance of 1787. "I conclude," he says (ib. 226), "therefore, that the States are bound, in fulfillment of their plighted faith, and through the medium of *their* laws," &c. "But the federal government has nothing to do with the subject, and its interference is sheer usurpation of a power not granted, but reserved." Judge Brinkerhoff is therefore a supporter of the first construction of the provision.

§ 779. Judge Sutliff discusses the question of the power of Congress, in an Opinion occupying nearly one hundred pages of the report, affirming the power to be with the States exclusively, according to the first construction. The introductory part of his argument (ib. 231-237) accords with that of Judge Brinkerhoff. The part of Judge Sutliff's Opinion must be noted<sup>1</sup> wherein he states what he supposes to be the received

<sup>1</sup> 9 Ohio, 243. "In the absence of any special provision authorizing Congress to legislate, it is claimed that Congress has become invested with power to legislate by virtue of three distinct provisions of the Constitution. The provision in Art. 4, it is said, makes it a duty of the States respectively to surrender the fugitive; and sec. 2 of Art. 3, extends the judicial power to all cases arising under the Constitution and laws of the U. S.; and the concluding clause of sec. 8, Art. 1, authorizes Congress to make the necessary laws for carrying the judicial power into execution. And under these three provisions, it has been suggested that Congress may have derived power to legislate for the rendition of fugitives. The argument may be simply stated thus: Congress has the power, under the last clause of sec. 8, Art. 1, to pass proper laws for the organization of the judiciary, and for the execution of its judicial powers. The rendition of a fugitive is provided for under the Constitution. Therefore, power of the judiciary should extend to that provision; and therefore Congress may legislate to carry into execution, in that regard, the judicial power. Now unless the premises of this fair statement of the argument be true, and unless the minor proposition of the premises be included in the major, the reasoning is fallacious and the conclusion false. But the minor proposition is not included in the major, and therefore the premises are not true. The judicial power is only extended to all *cases* arising under the Constitution and laws of the United States, &c., while the provision 'that no person held,' &c., is not a *case*. It is a compact or stipulation, it is a duty; but it is not even a stipulation or duty on the part of the federal government, but upon the States merely. It cannot, then, with propriety, be affirmed that Congress has any more power for the performance of the duty of delivering up fugitives, than for the performance of any other duty of the States under the Constitution. For while Congress has the power to pass or make all laws necessary and proper for carrying into execution the powers of the judiciary, it must be remembered that the powers of the judi-

theory for the legislation of Congress. From the analysis of the cases herein given, it will be seen that there actually is no authority supporting such a theory. The judge's mistake is a new illustration of the obscuration of the whole subject by the Opinions in Prigg's case. The case supposed by Judge Story to be within the judicial power was a case in which the Government of the United States, not a *State*, was party defendant. This part of Judge Sutliff's argument is also important, as it may bear on that theory for the legislation of Congress which arises from the fourth construction. The greater portion of the Opinion is an elaborate discussion of the position that the question presented is *res adjudicata*, including a critical examination of the arguments judicially affirmed in Prigg's case (ib. 253-275). On the supposition that views of "polity" or political expediency may have influenced the court in that case, Judge Sutliff maintains, in a historical exposition (ib. 277, 278), that the "political propositions" assumed by the court are in conflict with the true doctrine of the distribution of sovereign power between the States and the national Government. He concludes that while "the number of legal opinions" may be for the constitutionality of the Acts of Congress, "the weight of authority," in the true sense of the word, is that Congress has not the power to legislate, but that it is with the States.

ciary only extend to 'cases under the laws of the U. S.' &c., and that no laws can be passed by Congress except within the limits of its delegated powers. It therefore follows that the *judicial* power of the federal government, as to *cases* arising under the laws of the U. S., is only coextensive with the *legislative* power of the federal government, and therefore extends no further in regard to cases arising under the laws of the U. S. than the delegated powers of Congress to legislate. Therefore, if no power is delegated to Congress, independent of the judiciary clause, to legislate for the rendition of fugitives, inasmuch as the power of the judiciary is only coextensive with the power of Congress in that regard, it is certain that Congress has no power, under the grant of power to make laws to carry the judicial power into execution, to pass laws *beyond the extent* of the judicial powers; and which, as we have seen, do not extend to any legislation by Congress in relation to the rendition of fugitives, Congress having no power to legislate on that subject. But it is absurd to say that the Constitution ever contemplated a delegation of power by the States to Congress to legislate for the enforcement of *duties devolved upon the States* under the Constitution. Nor can it with any reason be pretended that Congress has power to legislate as to *any duty* of the States without conceding a like power to legislate for the enforcement of *all duties* of the States under the Constitution. If, then, Congress has power to legislate respecting the duty of the States to surrender fugitives, it has the power to enforce the duty of each State, whether slave or free, to extend all the privileges and immunities of citizens to the citizens of every other State, whether negroes, mulattoes, quadroons, or others, as well as whites. And it might with equal propriety," &c.



§ 780. In *United States v. Buck*, in the U. S. Dist. Court for the Eastern District of Pennsylvania, 1860, 8 Am. Law Reg. 540, the defendant had obstructed the Marshal holding a fugitive slave in his custody under a certificate under the law of 1850. Judge Cadwalader commenced his charge by saying:—"The government of the United States exists through a delegation of specifically defined powers, which the several States have yielded upon certain conditions. The rightful continuance of the government is dependent upon the faithful performance of these conditions." After mentioning the delivery of fugitives from justice and labor as among these conditions, he observes:—"In legislating for the fulfillment of these two constitutional conditions, Congress has never assumed the power of disposing at pleasure of the custody of a fugitive of either kind. The Constitution would not have sanctioned any such arbitrary legislation." The judge does not otherwise explain the basis of the power of Congress, which power he fully sustains.

In the same charge, *ib.* 543, Judge Cadwalader affirms:—"The owner of a fugitive slave is not bound to proceed under either of these laws. He may follow the slave into the State into which he has escaped, and may without any legal process arrest him there; and may, without any judicial certificate, or other legal attestation of the right of removal, carry him back to the State from which he escaped. All this may be done lawfully. But if the owner does not, under one act or the other, obtain a certificate of his right of removal, he becomes liable as a trespasser, for the arrest, detention, and removal, unless he can prove the escape and that the fugitive owed him service or labor in the State from which he fled."

In attributing this operation to the provision, independently of any legislation, the judge supports the fourth construction.<sup>1</sup>

<sup>1</sup> In many other cases maintaining the law of 1850, the power of Congress has been necessarily affirmed, without any particular examination of the basis of the power. The following are the principal authorities:—*Henry Long's case*, before Judson, J., U. S. Dist. C., 9 Legal Obs. 73, S. C., 3 Am. Law Journal, 294. The opinions in *Sims' case*, IV. Month. L. R., charges by Nelson, J., U. S. Cir. C.; 1 *Blatchford's R.* 635; 2 *ib.* 559; *U. S. v. Reed*, *ib.* 437, 469. Trial of Scott, U. S. Dist. C., before Sprague, J., IV. Month. L. R. 159. Case of John Davis before Conckling, J.,

§ 781. There seems to be a very general impression that the doctrine implied in asserting the power of Congress is, that a power is given by the Constitution *to the national Government*, as distinguished from any department or officer thereof, and that Congress, legislating to carry into effect that power, is either enforcing the duties of the States or maintaining rights correlative to those duties.

But in the greater number of cases, later than Prigg's case, in which this view may have been sustained, the courts appear to have understood Story and the majority of his associates as sustaining this construction, and they appear to have relied mainly on the authority of the Opinion of the court in that case as they understood it.

If, then, Story's real doctrine in that case has been correctly distinguished in the preceding pages and has been misapprehended in these later cases, the supposed bulk of opinion in favor of this construction is for the greater part imaginary.

On the other hand, if that adaptation of the third construction under which Congress legislates to carry into effect a power of the judiciary department, in cases between the claimant and the national Government, was that which was adopted by Judge Story and a majority of the court, it has not been supported by the later cases, and stands not only alone, but in antagonism to the received theory; and it is very doubtful whether a majority of Judge Story's associates, or even any one other member of the court, agreed with him in this construction.

Judge Hornblower, in the New Jersey case, Judge Smith, in the Wisconsin cases, and Judges Brinkerhoff and Sutliff, in the Ohio case, appear to have supported the first construction. This is the view generally taken by those who deny entirely the power of Congress to legislate on the subject. Chancellor Walworth has been often quoted as sustaining the same doc-

U. S. Dist. C.; *ib.* 301; U. S. v. Hanway, U. S. Cir. C., before Grier, J., 2 Wallace, Jr., 139. The proceedings in Jerry's case, at Syracuse, N. Y.; Henry v. Lowell, 16 Barbour, 269; Fisher's case, before Kane, J., U. S. Dist. C., IV. Month. L. R. 394; *Ex parte* Jenkins, 2 Wallace, Jr., 521; Van Metre v. Mitchell, and Oliver v. Weakley, *ib.* 311, 324; Van Orden's case, VI. Month. L. R. 295; Anthony Burns' case, before Commissioner Loring, VII. Month. L. R. 181; *Ex parte* Robinson, 6 McLean, 355.



trine, though his opinion really agrees best with the fourth construction.<sup>1</sup>

§ 782. The action of the Commissioners of the United States Circuit Courts, under the law of 1850, has always been justified on the admission that they could not be invested with the judicial power of the United States. The opinions of gentlemen holding this office cannot therefore be cited as judicial authority, though their intrinsic merits may entitle them to high consideration among other juristical arguments.<sup>2</sup>

§ 783. The opinions of the gentlemen holding the office of Attorney-General of the United States may be thought to have an authority superior to that of private jurists. The President of the United States, before signing the bill of 1850, had requested of Mr. Crittenden, Atty.-Gen., his opinion on the constitutionality of the sixth section of the Act, and particularly whether the last clause was in conflict with the constitutional guarantee of the writ of habeas corpus. In this opinion, dated Sept. 18, 1850, Mr. Crittenden rests the power of Congress on the decision in *Prigg's case*.<sup>3</sup>

§ 784. The writers more particularly known as commentators on the Constitution have not given any remarkable attention to these provisions.<sup>4</sup>

<sup>1</sup> A view very nearly coinciding with Chancellor Walworth's may be found in *A short reading on a short clause in the Constitution of the United States*, VII. Monthly Law Rep. 316 (October, 1854). The anonymous contributor supports the fourth construction of the provision, making it applicable by the judiciary and maintaining the doctrine of seizure. He denies any power in Congress to legislate.

<sup>2</sup> In *Sims' case*, Mr. Commissioner Curtis based the power of Congress on that adaptation of the third construction which was Judge Story's in *Prigg's case*, according to which the claim is against the national Government, and thereby a case arises within the judicial power. IV. Month. L. R. 6. The report will be given hereinafter among the authorities on the question, whether the judicial power of the United States has, by the Act of 1850, been conferred on the Commissioners. Mr. Loring's decision, in *Burns' case*, will also be noted in that connection; it has no bearing on this question of construction.

<sup>3</sup> 5 Opinion of Atty.-Gen. 254. His statement of the doctrine of that case is as follows:—"It is well known, and admitted historically and judicially, that this clause of the Constitution was made for the purpose of securing to the citizens of the slaveholding States the complete ownership in their slaves as property in any and every State or Territory of the Union into which they might escape (16 Peters, 539). It devolved on the general government as a solemn duty to make that security effectual. \* \* Thus the whole power, and with it the whole duty of carrying into effect this important provision of the Constitution was with Congress."

<sup>4</sup> N. Y. Legal Obs. IX. 10:—"This section [the second of the fourth Art.] has received only sparing attention from writers on the Constitution. It seems to

§ 785. In the Senate of the United States, Mr. Clay<sup>1</sup> bore a principal part in the enactment of the so-called Compromise Measures of 1850, though the fugitive-slave law was not framed by him, nor did he vote on it. His observations on the nature and operation of the provision are hardly reconcila-

have been carefully avoided by all publicists whose works we have consulted. Kent, Story, and others, it would seem, when commenting on the Constitution, might have given the *questio verata* of the United States government an examination commensurate with its importance. These great luminaries of the law owed it to the American people. This they have not done."

<sup>1</sup> Mr. Clay, on the 29th of January, 1850, submitted in the Senate his "Compromise Resolutions," of which the 7th was, "That more effectual provision ought to be made by law, according to the requirements of the Constitution, for the restitution and delivery of persons bound to service or labor in any State, who may escape into any other State or Territory of this Union;" and in a speech on these resolutions, Feb. 5 and 6, 1850, said:—"On that subject, I go with him who goes farthest in the interpretation of that clause in the Constitution. In my humble opinion, it is a requirement by the Constitution of the United States, which is not limited in its operation to the Congress of the United States, but extends to every State in the Union; and I go one step farther: it extends to every man in the Union, and devolves upon them all an obligation to assist in the recovery of a fugitive from labor who takes refuge in or escapes into one of the free States. And, Sir, I think I can maintain all this by a fair interpretation of the Constitution: it provides, &c. It will be observed that this clause in the Constitution is not among the enumerated powers granted to Congress, for, if it had been the case, it might have been urged that Congress alone could legislate to carry it into effect; but it is one of the general powers, or one of the general rights secured by this constitutional instrument, and it addresses itself to all who are bound by the Constitution of the United States. Now, Sir, the officers of the general Government are bound to take an oath to support the Constitution of the United States. All State officers are required by the Constitution to take an oath to support the Constitution of the United States; and all men who love their country, and are obedient to its laws, are bound to assist in the execution of those laws, whether they are fundamental or derivative. I do not say that a private individual is bound to make the tour of his State in order to assist an owner of a slave to recover his property; but I do say, if he is present when the owner of a slave is about to assert his rights and endeavor to obtain possession of his property, every man present, whether he be an officer of the general or the State Government, or a private individual, is bound to assist, if men are bound at all to assist in the execution of the laws of their country."

Then, after a reference to the provision for fugitives from justice, Mr. Clay said:—"It imposes an obligation upon all the States, free or slaveholding; it imposes an obligation upon all officers of the government, State or Federal; and I will add, upon all the people of the United States, under particular circumstances, to assist in the surrender and recovery of a fugitive slave from his master."

The Act of 1850 was framed by Mr. Mason, of Virginia. Mr. Clay, it is said, thought the law objectionable in shape; but in the Senate, in a speech on the violations of the law, Feb. 21 and 24, 1851, 2 Speeches of H. Clay, 608, sustaining it, said, *ib.*, p. 620:—"But, what is this Constitution? It makes a government. It is an aggregate of powers vested in the government—some of them enumerated, others, from the imperfection of human nature and human language, are not specified, but are incidents to powers granted." Then, quoting the concluding clause of the eighth section of the 1st Art.:—"I hold that when it is said a thing shall be done, and when a government is created to put this Constitution into operation, and no other functionary or no other government by the United States is referred to, the duty of enforcing the particular power, the duty of carrying into effect the



ble with any view that has been judicially propounded; but they are worthy of notice, not only on account of his eminent position, but because, in all probability, they correspond with ideas popularly adopted in the discussion of this subject.

§ 786. If, among countless opinions of private persons, which have been published since 1850, on the question of the power of Congress, one may be selected for acknowledged juristical authority, it is that of Mr. Webster, who, on more than one occasion, expressed his acquiescence in the existing judicial determination of this question. But his individual opinion appears clearly to have been that of Judges Hornblower and Smith, and adverse to the attribution of legislative power to Congress.<sup>1</sup>

§ 787. In the Boston Daily Advertiser of the 19th November, 1850, appeared the opinion of Benjamin R. Curtis, Esq., afterwards Judge of the Supreme Court of the United States,

specific provision, appertains to the general Government, to the government created by the Constitution of the United States. The Constitution declares that a slave shall be delivered up. It says not how or by whom, whether by the State or by the general Government, or by any officer; but it grants authority to Congress to pass all laws necessary and proper to carry into effect the powers granted by the Constitution." In continuing his argument, Mr. Clay said, *ib.* 621:—"There is a large class of powers in the original Constitution and in the twelve subsequent amendments which declare that certain things shall be, but specify no particular authority by which they are to be carried into effect."

<sup>1</sup> In his speech in the Senate, March 7, 1850, Works V. 355, Mr. Webster said:—"I have always thought that the Constitution addressed itself to the legislatures of the States or to the States themselves. It says that those persons escaping from other States 'shall be delivered up,' and I confess I have always been of the opinion that it was an injunction upon the States themselves. When it is said that a person escaping into another State, and coming, therefore, within the jurisdiction of that State, shall be delivered up, it seems to me the import of the clause is, that the State itself, in obedience to the Constitution, shall cause him to be delivered up. That is my judgment. I have always entertained that opinion, and I entertain it now. But when the subject, some years ago, was before the Supreme Court of the United States, the majority of the judges held that the power to cause fugitives from service to be delivered up, was a power to be exercised under the authority of this government. I do not know, on the whole, that it may not have been a fortunate decision. My habit is to respect the result of judicial deliberations and the solemnity of judicial decisions. As it now stands, the business of seeing that these fugitives are delivered up, resides in the power of Congress and our national judicature," &c.

It appears that the view which Mr. Webster's individual judgment approved was also that held by some who held the extreme opposite doctrine on States' rights. Mr. Clay, in the speech last noted, remarked that "the learned Senator [Mr. Barnwell Rhett, of South Carolina] contended that there was no power in the government of the United States to pass the fugitive-slave law." And noticed, "among the most remarkable features of the times, that there are certain coincidences between extremes, in this body and in the country:" speaking of Mr. Rhett, and Mr. Chase, of Ohio, as coinciding on this question.

as counsel for the United States Marshal, dated Nov. 9, on the constitutionality of the Act of Congress of 1850. Judge Curtis did not, in this, consider the question of the power of Congress to legislate on the subject. An extract from the opinion will hereafter be given,<sup>1</sup> from which it may be inferred that, in his view, the claim is made on the national Government, which may respond thereto, at its pleasure, and in any manner it may judge proper; that there is no "case" within the judicial power, unless Congress should choose to place it within the action of that power. In this, Judge Curtis' view agrees best with the third construction, though he apparently differs from Judge Story, in *Prigg's* case, by not recognizing, as a basis of the legislative power of Congress, the "case" arising under the Constitution and so falling within the judicial power.

<sup>1</sup> See *post*, Ch. XXIX., where the authorities on the question of the Commissioners being invested with judicial power, are considered.



## CHAPTER XXVII.

DOMESTIC INTERNATIONAL LAW OF THE UNITED STATES. THE SUBJECT CONTINUED. QUESTION OF THE CONSTRUCTION OF THESE TWO PROVISIONS EXAMINED. DOCTRINE OF SEIZURE AND REMOVAL EXAMINED. APPLICABILITY OF THESE PROVISIONS BY THE JUDICIAL POWER. TRUE BASIS OF THE LEGISLATIVE POWER OF CONGRESS.

§ 788. It will be remembered that the opinions cited in the last chapter were referred to as authorities on the *construction* of these provisions,<sup>1</sup> but their value in this respect cannot be estimated without deciding at the same time upon their value in determining the question of the legislative power of Congress. Hence, although according to the method herein proposed that inquiry does not properly arise until the construction of these clauses has been settled, it will be necessary to examine these opinions with reference to their harmony with the general doctrine of the legislative power of Congress.

The legislative power of Congress is defined in the eighth section of the first Article of the Constitution. This section contains various specific grants of this power, or grants of legislative power in reference to various objects particularly specified. The grant which is contained in the last paragraph of this section is equally a specific one, as contrasted with a general grant of legislative power, but it is given in reference to a class of objects specified in more general terms. The grant is of power "to make all laws which shall be necessary and proper for carrying into execution the foregoing powers and all others vested by this Constitution in the Government of the United States, or in any department or officer thereof.

The powers conferred on Congress by this last clause are denominated by Judge Story, in the twenty-fourth chapter of his

<sup>1</sup> *Ante*, § 727.

Commentaries, "the incidental powers." As he has observed, they are in fact, by force of this clause, *express*, and not *implied* powers. He says, in sec. 1254, "If it [this clause] does not in fact (as seems to be the true construction) give any new powers, it affirms the right to use all necessary and proper means to carry into execution the other powers; and thus makes an *express* power which would otherwise be merely an *implied* power."<sup>1</sup> And in sec. 1243 Story says, "The plain import of the clause is, that Congress shall have all the incidental and instrumental powers necessary and proper to carry into execution all the express powers. It neither enlarges any powers specifically granted, nor is it a grant of any new power to Congress; but it is merely a declaration for the removal of all uncertainty that the means of carrying into execution those otherwise granted are included in the grant. Whenever, therefore, a question arises concerning the constitutionality of a particular power [referring to power in Congress to legislate], the first question is, whether the power be *expressed* in the Constitution. If it be, the question is decided. If it be not *expressed*, the next inquiry must be whether it is properly an incident to an express power and necessary to its execution. If it be, then it may be exercised by Congress. If not, Congress cannot exercise it."<sup>2</sup>

None of the powers of legislation which, in the above-cited section of the first Article are particularly specified, and which, in the last clause of that section are spoken of as "the foregoing powers," have ever been supposed to relate to the clauses of the fourth Article now under consideration. Nor has it ever been claimed that a power to legislate respecting the objects of these clauses is "necessary and proper" for carrying into execution any of these "foregoing powers." The power, if it exists, must therefore be one of those which Story calls "incidental powers" of Congress, and be included in the power specified in the last clause of the section, "to make all

<sup>1</sup> This power has sometimes been named "the discretionary power of Congress;" see 1 Calhoun's W. 253, and the definition of implied powers on the same page.

<sup>2</sup> This statement of the doctrine is original with Mr. Madison in a report in the Virginia Assembly, Jan. 20, 1800, on the alien and sedition laws.



laws necessary and proper for carrying into execution [the foregoing powers and] all *other* powers vested by this Constitution in the Government of the United States or in any department or officer thereof."

§ 789. Some of the opinions already cited may seem to assert a power in Congress to legislate on this subject, without distinguishing whether the power is attributed by implication, to Congress, in the first instance, that is without reference to carrying into execution a power vested in the national Government or in a department or officer thereof, or whether a power is attributed, in the first instance, to the Government, or to a department, or to an officer of some department, for carrying which into execution legislative power has been expressly given to Congress.<sup>1</sup>

But, as Story shows in the Commentaries above cited, there is no such thing as an implied power, *in Congress*, to legislate. All its powers are expressly given, and are either special or incidental. The opinions supporting the legislation of Congress must be taken to regard it as the execution either of a power in the *Government* of the United States as a unit, or of a power in some *department* or *officer* thereof.

§ 790. The opinion supporting the legislation of Congress as carrying into execution a power belonging to a *department* of the Government, or to an *officer* thereof, is that of Judge Story, in *Prigg's* case, if hereinbefore correctly understood, and of such judges as may have relied on that opinion, understanding it in the same manner.

According to that opinion, Congress legislates to carry into effect a power, vested in the judicial department of the national Government, over cases at law or controversies between a demanding Governor of a State or a claimant owner, on the one hand, and the national Government on the other,<sup>2</sup> as opposing

<sup>1</sup> Compare *ante*, pp. 449, Nelson, Ch. J.; 483, Taney, Ch. J.; 484, Thompson, J.; 485, 501, McLean, J., and Marvin, J.; 496, Read, J.

<sup>2</sup> If, in affirming the master's right to seize and remove the slave, Judge Story did not absolutely affirm that under this provision he must be regarded as chattel, and not as legal person, the prevailing idea in his mind seems to have been that the fugitive from labor was to be considered only as the *object* of the owner's right. (16 Peters, 613.) Upon this idea there was more consistency, and

parties; and the inquiry occurs first of all—can a claim against the national Government be, under the Constitution alone, the subject-matter of a case at law or equity, or of a controversy within the judicial power?<sup>1</sup>

It is admitted by all that, if Congress will provide for the settlement and satisfaction of any claims or demands against the United States, they may entrust the adjudication of such claims to the judiciary, and by consenting that the United States shall become a party before the national judicial tribunals, originate cases at law or equity, and controversies to which the United States is a party. But it does not appear how, anterior to such legislation, the United States, or the national Government as its representative, can be a party in

even a sort of necessity, in regarding the claim as one to be made against either the State in which the escaped slave should be found or the national Government, and the delivery as an act resulting from the duty of that State or of that Government, correlative to the owner's right. The slave being regarded as the object, only, of action, and never as the subject of rights, the claim would necessarily be against some third party as the legal person refusing to fulfill the obligation correlative to the owner's right in respect to that object. Such a person might, perhaps, be found in the State wherein the slave is found or in the Government of the United States. Story says, 16 Peters, 616:—"It is plain, then, that where a claim is made by the owner out of possession for the delivery of the slave, it must be made, if at all, against some other person, and inasmuch as the right is a right of property capable of being recognized and asserted by proceedings before a court of justice between parties," &c., &c. (And compare Coulter, J., in *Kauffman v. Oliver*, *ante*, p. 495.) It will hereinafter be argued that as no natural person can, in view of this provision, be considered as a chattel, the fugitive from labor cannot be considered simply as the object of the rights of others, whatever may be the law of the State from which he may have fled, and that his *status* or condition is determined always by the law of the State in which he is found, subject to the effect of this provision, which views him as a *person* sustaining a legal relation towards another person in which he owes service or labor, and therefore designates him as a legal person whose obligation is to be established on claim. Being so regarded, the claim of the person to whom such service or labor may be due, under the provision, may be like the claim of a lord against his vassal, or of a master against his servant; which, when denied, is denied by the bondman himself, while courts, whether State or national, holding jurisdiction over the territory wherein they may both be found, may apply the provision as private law, *i. e.*, national municipal law, having a limited personal extent, and international effect, and those courts will then make the delivery provided for, when the claim is established in the name of the *law*, *i. e.*, the constitutional provision in this case, without reference to the State in which the fugitive may be found, or to the Government of the United States, as parties in interest.

<sup>1</sup> Not every question arising under the Constitution is a *case* or a *controversy* within the judicial power. See Marshall's argument in *Robbins*, or *Nash's case*; *Abridged Debates*, Vol. 2, p. 462, and *post* in Ch. XXVIII.; also Judge Sutherland's argument on this ground against the doctrine that a case arises under this provision as law acting on the States, 9 Ohio, 244, and *ante*, p. 527.



any case or controversy simply as founded on their own sovereign promise or guaranty in the Constitution.<sup>1</sup>

If a distinction is made between the United States and the national Government, and it is said that the latter is bound under the Constitution, as a law proceeding from a sovereign author, and that this law creates a relation between that Government and the demanding Executive of a State or the claimant owner, the same argument still applies against attributing to the national judiciary power to apply that law as in a case between the parties to that relation. The Government as an integer, existing in three departments, clothed with distinct functions, is the subject of the law. The judicial and executive functions cannot be exercised by the two departments against the integral whole, unless the consent to appear and submit to the action of the judiciary and executive has been given by the legislative function.<sup>2</sup>

If, then, before Congress has legislated, there is no case or controversy to which the national Government or the United States is a party, to which the powers of the judiciary already extend, Congress cannot legislate to carry into effect any power of such judiciary in such cases or controversies; for there is not as yet any such power.

§ 791. It has not been pretended by any who support the legislation of Congress, as carrying into execution a *power vested in the integral Government*, that the power to be executed has been vested in that Government by any express grant in the written Constitution. The jurists who have maintained the existence of such power, have relied solely on their individual conceptions of the unexpressed purposes of the authors of the Constitution. The supposed power rests on implication, or is confessedly an implied power in the Government.<sup>3</sup>

The majority of the opinions supporting the legislation of Congress on this ground imply the existence of the power in

<sup>1</sup> Story's Comm., §§ 1675-1678. 1 Curtis' Comm., chapters 4 and 6. Devcreux's Reports of Cases in the Court of Claims, Appendix, p. 6. Compare Iredell, J., in *Chisholm v. Georgia*, 2 Dallas, 437, 438, and Wilson, J., *ibid.* 459, 460.

<sup>2</sup> Curtis' Comm., § 56, Jay, Ch. J.; in *Chisholm v. Georgia*, 2 Dallas, 419, 478.

<sup>3</sup> Compare Story, J., in 16 Peters, 618, 619; *ante*, p. 470.

the Government from a previous implication of a duty in such Government; not a duty correlative to a right in a legal relation, on which cases within the judicial power may arise, but a political duty, above the ordinary administration of justice, and like other political duties of states towards private persons or other states. Whether Story's opinion may or may not be reconciled with this view, it seems to have been the doctrine of the majority of the court in Prigg's case, and that doctrine which is generally reaffirmed in the opinions which follow that case as leading authority.

Whatever may be the nature of the duty; that is, whether it is its political duty or its legal duty, it would seem that it must be admitted that if any duty is imposed on the national Government by the Constitution, the power to fulfill it is given by necessary implication.<sup>1</sup>

There is not the slightest argument offered in favor of the idea that the delivery of a fugitive from justice or from labor is a duty enjoined upon the national Government as a whole, or that the claim for the one or the demand for the other is to be made against the national Government as a whole, and the implication of such a power is at variance with the general idea of the Constitution, which invests the functions of sovereign power separately. So far as the Constitution is public *law* in the sense of a rule, it acts on certain public persons who may hold either the legislative, the executive, or the judicial functions, for the exercise of those sovereign powers which belong to the United States, or the integral people of the United States from whom the Constitution derives its authority. To the Government, as a whole, nothing is granted in the Constitution; no rights or duties are attributed to it in that instrument. It is the United States only as a pre-existing political person that promises or guarantees, and wherever they do this in the Constitution, they make *law* for natural persons,

<sup>1</sup> But then the power to legislate in reference to the fulfillment of such duty would not be distinguishable from the general power over whatever claims may be made against the United States or the national Government. It is not necessary to presuppose a power in the judiciary department which shall thereby be carried into effect. Compare Judge Sprague's remarks on Judge Story's statement of the basis of legislation in Prigg's case, *ante*, p. 468, note.



creating rights and duties which may be enforced by the executive when the law is judicially administered.<sup>1</sup>

§ 792. The only other implication of a power in the integral national Government is that founded upon the idea that these provisions are a law, in the strict sense, acting on the States as its subjects; though whether any court has actually supported this theory may be doubted.

If, indeed, any clause in the fourth Article is to be construed as a law in the strict sense acting on the States as its subjects (the second construction), there must doubtless be some person, distinct from the States themselves, who may have authority to enforce it upon them. But admitting that any clause has this character, it is still to be proved that the national Government is this person.

The power which, under this construction, is attributed to the national Government, cannot even be classed with those which Story, in sec. 1256 of his Commentaries, calls "resulting power, arising from the aggregate powers of the national Government." For among all the offices or duties assigned to that Government by the Constitution, there are none which severally, or in the aggregate, require the possession of power to act on the States, or to act instead of the States in fulfilling, within their several domains, the duties they may owe to the other States or to private persons.<sup>2</sup>

So far as any argument has been presented, in any of the opinions cited,<sup>3</sup> the power to act on the States, or to act for the States, in fulfilling their obligations under this construction of

<sup>1</sup> The only place where the "Government of the United States" is mentioned is in the clause giving Congress this general grant of powers, and in the clause preceding—giving power to exercise exclusive legislation "over such district as may by cession of particular States and the acceptance of Congress, become the seat of the Government of the United States."

<sup>2</sup> There is much, indeed, said by Judges Shaw and Marvin, by McLean in *McQuerry's* case, and in *Prigg's* case, and even by Story in *Prigg's* case, like the support of such a resulting power. It may be remarked here, that if a power may be implied in the national Government from the coercive character of the provision, that coercive character should be shown from something else than the presumed existence of a power in that Government to carry it into effect.

<sup>3</sup> In my own place I am ready to say, with Judge Sutfill, 9 Ohio, 275:—"After the most careful examination, I am convinced, beyond any reasonable doubt, that the case of *Prigg, &c.*, is not a correct exposition of the law. On no principle of rational construction recognized by common law or sound reasoning, or by any rules of judicial decision, is it thereby shown that Congress has any power, under the Constitution, to legislate for the reclamation of fugitives from service."

these clauses, might as well be attributed directly to the national legislature, or to the executive. It will probably be admitted by all, that if these clauses are a law in the strict sense acting on the States as its subjects, which must be enforced by some person distinct from those States, the national Government is the person who may with the most propriety assume the office, since every power which the constituent people of the United States, the authors of the rule, are known to have delegated, they have delegated to some department or officer of this Government. But still any determination of the person who is to enforce this supposed law, is made by arbitrary opinion only, and cannot be discussed or examined as matter of law.

§ 793. The true character of these provisions, as public or private law, must be determinable by some juridical standard.

According to the first and second of the four constructions hereinbefore described, these two provisions operate on the States as the subjects of the rules contained in them. According to the first, the obligation imposed is like that under a treaty between independent nations. According to the second, it is like that created by law in the strict sense.

But, according to the view of the nature of the Constitution which is given in the twelfth chapter of this work, it is not in any part, more than another, a treaty or compact between the States as independent nationalities. It is, throughout, a law for the States only in the secondary sense of the word *law*; that is, as it describes a condition of things, and indicates the extent of the "reserved" powers of the States. So far as it is law in the primary sense, or a rule of action, it is either public law in determining the powers and duties of those functionaries who, together, constitute the national Government established by it, or private law determining the rights and obligations of private individuals. The Constitution does not create relations in which the States are, in any *legal* sense, the subjects of rights or obligations, and they cannot be the subjects of the rules contained in these provisions;<sup>1</sup> though, as evidence

<sup>1</sup> Sutliff, J., 9 Ohio, 316, *see ante*, §§ 359, 395. In § 359, on p. 423 of Vol. I. of this work, the public law contained in the Constitution was, inadvertently, described



of the fact, they determine the extent of the "reserved" powers of the States.

§ 794. Any one clause of the Constitution must be construed with the presumption that it is in harmony with the nature, scope, and design of the instrument, as apparent on a broad and general view.<sup>1</sup> In the twelfth chapter of this work it was held that the Constitution is both a declaration of the distribution, between the national Government and the several States, of the sum of powers belonging to an independent nation, and a law in the strict sense acting on all private persons within the United States; for the execution of which law a Government is at the same time established. As correlative to this doctrine, it is also held that (whether the Constitution was made by the integral people of the United States, or by the States entering into a federal union) the legal character of the Constitution is not in any one part more than in another that of a compact or treaty between independent states, creating duties which may be fulfilled by their separate and subsequent action.

This general character of the Constitution, as a law acting on private persons, and of the Government established by it, as intended to apply that law in determining rights and obligations of private persons, is undisputed.

as containing "provisions which create relations in which the several States or the Government of the United States are, in their political capacity, the subjects of rights or obligations." This is speaking more in accordance with the common phraseology than according to the view taken in the residue of the work. The States are known in the Constitution only as political persons holding certain of the powers of sovereign states or nations, not as subjects of law proceeding from other powers of sovereignty. Hence, the relations which they sustain can never be ordinary legal relations. It is true they may be parties in cases within the judicial power of the United States, so that they appear as claiming rights or denying obligations. But the relations in which these rights and obligations exist do not, properly speaking, arise under the Constitution of the United States. With the exception of questions of boundary between States, the rights litigated by the States seem only to arise from their own several laws. And the question is determined by the Constitution of the United States only so far as it is evidence of the extent of State powers. In some of the earlier cases, before the adoption of the eleventh amendment, there may be intimations of a contrary doctrine; e. g., in *Chisholm v. Georgia*, 2 Dallas, 464, Wilson, J., said:—"For they seem to think that the present Constitution operates only on individual citizens, and not on States. This opinion, however, appears to be altogether unfounded." The theory which Judge Sutherland, in 8 Ohio, 243, stated, as the received basis of the legislation of Congress in respect to fugitives, is at variance with the eleventh amendment. See *ante*, p. 468, note 2.

<sup>1</sup> See among Story's rules for construction, Comm. § 405.

Even if a clause precisely similar to one of these provisions of the fourth Article is to be found in the Articles of Confederation,<sup>1</sup> and if it could, under that system, have been made operative on private persons only by the action of the several States, yet these clauses in the Constitution cannot be held to have the same character, unless the plain interpretation of the words should indicate such a character. For it is matter of history that while the Confederation was in the nature of a federative league, and by many of the articles private persons were not affected except by the co-operation of the several action of the States, the Constitution was conceived of as being in this respect the contrary of the earlier system.

This reasoning should exclude the first and second of the four constructions, or, if it leaves room for either, it is for the first only; since, unquestionably, some of the acts to be done on the part of the States, according to the plan of Government devised by the Constitution, are in the nature of duties arising under the Constitution. But no power to enforce these duties, or to supply a want of action by the States in fulfilling these duties, has ever been pretended, if not expressly given by the Constitution.<sup>2</sup>

The idea of a law acting on the States, and to be made coercive or carried into effect without their action, by some other authority, appears never to have been advanced by any of the framers of the Constitution,<sup>3</sup> nor to have been discovered

<sup>1</sup> See the article quoted *ante*, p. 384.

<sup>2</sup> For example, to send Senators to the national Congress. Compare Smith, J., 3 Wisc. 128, *ante*, p. 519.

<sup>3</sup> The brief minutes of the debate in the Convention, given by Madison, on this provision, have been referred to on either side to support different conclusions. The subject appears first in the debate, Aug. 28, 1787, on the original provision for extradition of criminals:—

“Mr. Butler and Mr. Pinckney moved to require ‘fugitive slaves and servants to be delivered up like criminals.’

“Mr. Wilson. This would oblige the executive of the State to do it at the public expense.

“Mr. Sherman saw no more propriety in the public seizing and surrendering a slave or servant than a horse.

“Mr. Butler withdrew his proposition in order that some particular provision might be made apart from this article.”

On the 29th August, Mr. Butler moved to insert an article substantially like the adopted provision. Madison Papers, p. 1447.

All that is to be gathered from this is that, when the thing was first proposed, Wilson looked at it as devolving a duty on the States as the persons bound by the rule, while Sherman regarded it as a rule which would act, as private law, on



in the instrument by any contemporary commentators. There is no evidence that this construction was advanced in Congress when they proposed to legislate.

§ 795. On the principle of the continuation of laws, the international or quasi-international law which had before obtained between the States would have continued to be recognized in the United States, so far as it might be consistent with the provisions of whatever constitution of government should have been adopted. It seems allowable to refer to this pre-existing international or *quasi*-international law in construing the constitutional provisions which create new rules in cases formerly determined by that law.<sup>1</sup>

It may have been, before the adoption of the Constitution, that the delivering up of fugitives from justice and of fugitives from labor was customarily fulfilled under this international law, while such delivery may have depended solely on the several will of the State in which they should be found. The international law under such a state of things would have been binding on the States only as a law in the imperfect sense. It would have been a rule for them of positive morality,<sup>2</sup> which became positive law only by being identified as to its authority with the local law of the State. But from this fact alone it could not be argued that these clauses have the same character, that character which corresponds with the first construction. For the fact of their having been placed in the Constitution shows that they have a totally different legal character, and that, in the relations to which they apply, the old customary international law is excluded by a rule having a different authority; though that law, as it formerly obtained, might have produced like effects on private persons.

Still, if it cannot be determined from the words of the Con-

the master and slave, creating rights to be enforced in courts of law. Strangely enough this remark of Mr. Sherman has often been cited to show that he was opposed to recognizing a property in slaves.

The bill, at first, was for the rendition of fugitives from justice only, to which, when Congress had agreed on it, were added the clauses relating to fugitives from labor; and the bill appears to have passed without much discussion. See Wolcott, *arg.*, 9 Ohio, 139; Sutliff, J., *ib.* 255; Johnson, *arg.*, 16 Peters, 597. It may be observed, too, that Congress, at that period, assumed the possession of legislative power to an extent which has long been abandoned. See Sutliff, J., 9 Ohio, 257.

<sup>1</sup> *Ante*, p. 421.

<sup>2</sup> *Ante*, § 11.

stitution whether the law contained in these clauses is a law for the States as political persons, or a law for private persons, it may be just to infer that the new rule contained in them corresponds to the pre-existing law in its mode of operation, though it rests on a different authority. It may be argued that, if the delivery of fugitives from justice and fugitives from labor was made only by the State Government, acting in the matter of such delivery for the State as a political person, the clauses were intended to act on the States as its subjects; but that, if the delivery took place by persons administering the private law of the State, the clauses were intended to act as a private law.

§ 796. And, first, as to the pre-existing law respecting fugitives from justice.

From authorities cited in a former chapter, it seems that, in each several jurisdiction of the British Empire, persons who had committed atrocious crimes in other parts of the same empire could lawfully be seized and surrendered for trial; though the law on the subject must have been obscure when the act of 13 Geo. 3, c. 31, was enacted.<sup>1</sup> The question which is here of importance is, whether such surrender was carried out by ministerial or judicial officers applying ordinary positive law, or was the act of the supreme political authority in such jurisdiction, proposing to fulfill a duty of the state as a political person, a duty arising under public international law.

With reference to the comparative extent of their laws, and the territorial jurisdiction of their several courts, the American colonies were like independent national jurisdictions, and the judgment and process of a colonial court had no intrinsic force beyond the limits of the colony.<sup>2</sup> There was apparently, in this respect, no distinction between matters civil and criminal. As to each, the king was, theoretically, the so-called fountain of justice, or the head of the judiciary.<sup>3</sup> And it would appear that, even after the legislative unions, England, Scotland, and

<sup>1</sup> *Ante*, p. 396, note.

<sup>2</sup> Story's Comm. § 1307.

<sup>3</sup> Story's Comm. § 184. "The colonial judicatories, in point of law, were deemed to emanate from the crown, under the modifications made by the colonial assemblies under their charters."



Ireland were in like manner distinct jurisdictions,<sup>1</sup> in each of which the criminal or punitive law had a distinct territorial extent, and was applied by administrative and judicial officers whose authority was limited according to that extent. But since, in the theory of public municipal law, all offences or public wrongs were committed against the king's peace or against his crown and dignity, and the king, as prosecutor, was supposed to be everywhere present,<sup>2</sup> the arrest of a person charged with the commission of crime in any one colony or several jurisdiction of the British empire might have been considered equally legal in any part of the king's dominions. The final extradition or removal of the accused would apparently have been beyond the functions of any judge or magistrate, and may have been accomplished by some government-warrant; but it seems that the arrest in such cases was justified by private municipal law, and might have been made by magistrates empowered for ordinary commitments, independently of any special authority from a department of the government having charge of the external relations of the state.

In the English cases,<sup>3</sup> which were noted in an earlier chapter, and in similar cases occurring in the colonies, the sovereign under whose authority the arrest and *quasi*-extradition of the accused person was made was the same sovereign whose law had been violated in the place where the crime had been committed. The whole proceeding was therefore more like an ordinary arrest and commitment than such arrest and *quasi*-extradition in one of the States can be under the present division of sovereign power in the United States. The sovereign power of the State wherein the crime was committed is totally distinct from that of the State into which the criminal may have escaped. Yet the constitutional provision emanates from a possessor of sovereign powers who holds them in all the States, *i. e.*, the integral people of the United States, and it may be fair to suppose an intention to continue, substantially, the old law between the colonies,

<sup>1</sup> Molloy, *de Jure Mar.*, B. iii. c. 2; *Commonw. v. Simmonds*, 5 Binney, 624.

<sup>2</sup> 1 Bl. Comm. 268, 270.

<sup>3</sup> See *ante*, on pp. 395-397.

and to give the provision such a construction as will assimilate it in character to the former law—a law acting directly on the fugitive from justice, and not on the States as political persons.

The compact of 1643 between the New England colonies was between parties politically identified with an influential proportion of the States originally united under the present Constitution, and the eighth article of that compact may be referred to to construe this public act *in pari materia*. The surrender of fugitive criminals was by that article placed under the administration of the ordinary magistrates, or administered as part of ordinary criminal law.

The Articles of Confederation contain a clause the wording of which is almost the same as that of the constitutional provision.<sup>1</sup> Under that federative organization, the provisions concerning inter-State relations were made to take effect on the private persons within their respective territory only by the several State or its Government. The provision referred to was not effectual then for the arrest and extradition of a fugitive from justice, without some autonomic action on the part of the State in the fulfillment of its obligation under that compact. But that organization, from its want of correspondence with the essential existence of the people of the United States as the possessors of national sovereignty,<sup>2</sup> was thrown aside by them for one recognizing that uneradicated public law which, before the Revolution, had integrally combined all the English colonies. The temporary existence of an organization founded on the recognition of one only of the antecedent elements of political existence, *i. e.*, the colonial possession in severalty of a portion of the powers of sovereignty, cannot be held to destroy the value of the former inter-colonial usage as a guide in the construction of this clause.

Even if the fact, that the local law against which the person is charged to have offended proceeds from a possessor of sovereign power entirely distinct from the possessor of sovereign power in the State into which he has escaped, is taken to have destroyed this application of the colonial law, yet the construction here exhibited is that which is most in harmony

<sup>1</sup> *Ante*, p. 3.

<sup>2</sup> *Ante*, § 346.



with the rest of the Constitution. There appears to be no reason for saying that these clauses are exceptional to the Constitution as a whole, and that the rule contained in them must be a rule for the States as political persons acting on them as its subjects. For aught that appears in the Constitution, the right of the State, or of the Executive of the State from which the person charged fled to have the custody of his body, on demand, is correlative to an obligation on the part of the person so charged, in a legal relation between them, and no autonomic action on the part of the State into which he fled is required of it, except as it may choose to exercise a concurrent jurisdiction in applying the law which creates that relation.

§ 797. It is to be noticed here that the demand and delivery provided for by this clause is a right of action belonging to a public and not to a private person. It is a State of the Union which has the rights, in a relation established by the Constitution between it and the persons who are the objects of the demand and delivery. And since, under a republican form of government, the State may be represented by various persons exercising different functions of sovereign power under its public law, it was necessary, under either construction of the clause, to designate who should be recognized as the representative of the State claiming its right. But it is not necessary to infer from this alone that the corresponding obligation created by the clause is a duty of the State in which the fugitive from justice is found, as a political person, or of the State Government or its executive organ.<sup>1</sup>

§ 798. The pre-existing law affecting the delivery of fugitives from labor is next to be referred to as an index to the construction of the second of these clauses.

The history of this topic of international law during the colonial period has already been fully given in former chapters of

<sup>1</sup> In *Kentucky v. Dennison*, *ante*, pp. 427, 428, Judge Taney says, "It is plain," since the "confederation was only a league," and "had no officer," &c., that the demand was to be made on the Executive, and "could be made on no other department or officer." (But certainly a State might have provided some other person to represent it in this relation.) Then the Judge argues that the framers of the Constitution, while engaged in establishing a general Government *having* officers, &c., could not have contemplated any one but the State Executive as the person on whom the demand should be made. Such reasoning may be unanswerable; but can it be called *reasoning*?

this work. It has been shown that the claim and delivery of such fugitives was altogether a matter of private law, decided by judicial tribunals, whether it was determined by unwritten or common law, or by intercolonial compact.<sup>1</sup>

The Articles of Confederation do not contain any clause relating to fugitives from labor. It was determined in each State, before the adoption of the Constitution, by common-law principles only, and was matter for judicial decision only, as it had been during the colonial period. There is probably no instance in which the claim for such fugitive from labor was made upon the Executive of any State or upon the State Government as a claim arising under public international law.

§ 799. If, then, the pre-existing law may be any criterion of the force and effect of either of these clauses, it indicates that it should receive the fourth of the constructions already indicated, and be understood to act directly on private persons in any one State, irrespectively of any juridical action on the part of the State, and to create a legal relation in which a Governor of a State demandant, or a private claimant, is the subject of the right, and a private person, the fugitive from justice or from labor, is the subject of the obligation.

Although these two provisions may have many points of resemblance, they are entirely independent of each other, and are not necessarily to be construed alike. If there is anything in the terms of the clause relating to fugitives from justice, or in the former customary law on the same subject-matter, to prevent its being thus understood, it still may be that the clause respecting fugitives from labor should receive the construction above indicated.

§ 800. If, then, either of these two provisions is to receive the fourth construction, under which it creates legal rights and obligations irrespectively of national or State legislation, the

<sup>1</sup> See particularly *ante*, § 322. The proviso in the 6th Art. of the Ordinance for the government of the N. W. Territory (*ante*, p. 114), declared by the Congress of the Confederation, July 13, 1787, while the convention was in session, may be supposed to have been the model for this provision. There was no occasion for determining the construction of that proviso. The words "may be lawfully reclaimed," &c., indicate, it seems to me, that it should operate as private law, and affect the owner and fugitive immediately; even though the articles are declared to be a compact. Mr. Wolcott, arguing in 9 Ohio, 124, infers the contrary.



question occurs, What is the right and obligation which may exist and be maintained by either provision, under this construction?

§ 801. The right of a State in respect to a fugitive from justice has always been claimed as a right to a delivery of the fugitive by some public person having authority within the forum, and on some formal demand by the Executive of the State from which he fled. It has never been supposed that, by the provision, the demandant State had, in the State wherein the fugitive is found, the same power over him which it had when he was within its territory. It has never been claimed that the Executive authorized to make the demand might, in virtue of that power, seize the alleged fugitive from justice and remove him to the State in which he is charged with having committed the crime.

Congress has no power to abridge any right given by the provision. The statute of Congress, in requiring the delivery of such fugitive by "the executive authority" of the State into which he may have fled when the demand made shall be accompanied by certain documentary evidence, is a direct authority<sup>1</sup> of the highest character, that by such a delivery on such a demand the right guaranteed and the obligation created by the provision are maintained and enforced.

§ 802. By parity of reasoning, the Acts of Congress which provide for the delivery of fugitives from labor, by certain public officers, to the person who may have made public claim in a prescribed manner, would seem to be high authority for believing that by such delivery on such claim the right created by the provision in the person to whom the fugitive may owe service or labor, and the obligations which are correlative to it, are maintained and enforced.<sup>2</sup>

But by the highest judicial authority it has been held that the fugitive slave may be seized, by the owner or his agent, and removed from the State in which he may be found, without the action, judicial or ministerial, of any person having within the forum authority to deliver him up on claim. This

<sup>1</sup> See Judge McLean's argument, 16 Peters, 670, *post*, p. 558, note.

<sup>2</sup> Sims' case, 7 Cushing, 300.

doctrine is so important, not only in its immediate consequences, but also in its bearing on other controverted points, that a full review of the cases must here be given.

§ 803. A case must first be noticed which, though it is, in fact, only authority on the question whether a claimant may seize the fugitive without warrant when intending to go before some officer named in the Act of 1793 and prosecute his claim, has undoubtedly been often taken as authority for the right to seize *and remove* by force of the constitutional provision alone. This case is more particularly to be noticed in this series of cases, as in it the doctrine seems to have originated that in the provision persons held to service or labor in one State, escaping into another, are recognized as the property of those to whom their service or labor is due; and, thence, the derivative doctrine, that the Constitution recognizes slaves as property in any part of the United States.

In this case, *Commonw. v. Griffith* (1823), 2 Pick. 11,<sup>1</sup> the action being for the seizure of a person as a fugitive, without warrant, Parker, Ch. J., said, *ib.* p. 18:—"This brings the case to a single point—whether the statute of the United States giving power to seize a slave without warrant is constitutional. It is difficult, in a case like this, for persons who are not inhabitants of slaveholding States to prevent prejudice from having too strong an effect on their minds. We must reflect, however, that the Constitution was made with some States in which it would not occur to the mind to inquire whether slaves were property. It was a very serious question, when they came to make the Constitution, what should be done with their slaves. They might have kept aloof from the Constitution. That instrument was a compromise. It was a compact by which all are bound. We are to consider, then, what was the intention of the Constitution. The words of it were used out of delicacy, so as not to offend some in the convention whose feelings were abhorrent to slavery; but we there entered into an agreement that slaves should be considered as property. Slavery would still have continued if no Constitution had been made.

<sup>1</sup> See the circumstances of the case, *ante*, p. 440.



"The Constitution does not prescribe the mode of reclaiming a slave, but leaves it to be determined by Congress. It is very clear that it was not intended that application should be made to the executive authority of the State. It is said that the Act which Congress has passed on this subject is contrary to the amendment of the Constitution, securing the people in their persons and property against all seizures, &c., without a complaint upon oath. But all the parts of the instrument are to be taken together. It is very obvious that slaves are not parties to the Constitution, and the amendment has relation to the parties.

"But it is said that when a seizure is made, it should be made conformably to our laws. This does not follow from the Constitution, and the Act of Congress says that the person to whom the service is due may *seize*, &c. Whether the statute is a harsh one, is not for us to determine. But it is objected that a person may, in this summary way, seize a freeman. It may be so; but this would be attended with mischievous consequences to the person making the seizure, and a habeas corpus would lie to obtain the release of the person seized. We do not perceive that the statute is unconstitutional, and we think that the defence is well made out."

Thacher, J., dissenting, said:—"Though I agree to many things said by the Chief Justice, I do not entirely coincide with him. I am not disposed to question the constitutionality of the statute, but I think that the seizures should be made in conformity to the laws of the several States, and not in violation

<sup>1</sup> The argument of counsel on the prevailing side may throw some light on the language of the court. (2 Pick. 13.) Mr. Merrick said:—"So the clause against unreasonable searches and seizures does not protect a slave, and he may be seized without the intervention of a warrant; and where is the danger in allowing a master to seize his slave in another State? He infringes no right of such State, and such State cannot alter the rights of the master. If he seizes a freeman, he does it at his peril. He cannot plead a mistake in the person. He must prove his property fully. If Congress had made no law on the subject, the master would have a right to take his property, for the State cannot divest him of it. This is, indeed, a great power, greater than we should be willing, in Massachusetts, to allow to any person; but slavery is tolerated by the Constitution of the United States, to which we are a party. There is the same violation of principle in permitting it to exist in the southern States, as in permitting the owner of a slave to come here to seize him." Mr. Morton, on the same side, *ib. p. 13*, said:—"The relation of a slave to his owner may be compared to that between master and apprentice, bail and principal; in which cases no warrant is necessary."

of the laws of any one of them. The laws here do not recognize a slave ; every person is a freeman, and entitled to the privileges of a freeman, one of which is to be secure against all seizures, &c., without a complaint upon oath. I admit that in the southern States they may seize a slave without a warrant, because it is according to the laws of those States. But it does not follow that the same may be done here. I think that it is the intention of the statute that the seizure of a slave here shall be by process of law here. The complaint should not state that Randolph was a slave—for our law knows no such creature—but that he was a person held to service by the laws of Virginia. I admit that Congress might prescribe a new method of apprehending a fugitive from service which should supersede our law. In the case before the court, the defendant, in my opinion, violated the law of our State.”

The reporter adds:—“The Chief Justice then remarked that the construction now given by the court to this statute had been adopted ever since the federal Constitution went into operation, by *Lowell* and *Davis*, Justices of the District Court of the United States.”

§ 804. The first opinion directly sustaining the doctrine that the claimant may seize and remove the alleged fugitive under the provision itself seems to be that of Nelson, Ch. J., in *Jack v. Martin*, 12 Wend., 14 Wend.;<sup>1</sup> and it would seem that even Chancellor Walworth might be taken to have supported the doctrine; for though the Chancellor speaks of the writs of personal replevin and habeas corpus as means of disputing the master's right to the possession of the alleged slave, he would appear to hold that, if the master can remove the slave from the State before any such writ can be served on him, such removal would be lawful; that the State would have no right to regard such an act as an infringement of her sovereignty, or enact any law against such a removal.<sup>2</sup>

§ 805. But the leading authority on this point is *Prigg's* case. It is difficult to see how a judge could agree in the judgment of the court without supporting the right to seize and

<sup>1</sup> See counsel in *Prigg's* case, 16 Peters, 578.

<sup>2</sup> See the abstract of the report, *ante*, § 743.



remove the fugitive by the provision alone. In the judgment, as has been seen, all the judges concurred.<sup>1</sup>

Judge Wayne supported the opinion of Judge Story in all respects, and, 16 Peters, 646, said:—"The provision contemplates, besides the right of seizure by the owner, that a claim may be made where a seizure has not been effected, or afterwards, if his right shall be contested. That the claim shall be good upon the showing by the claimant that the person charged as a fugitive owes service or labor under the laws of the State from which he fled." It appears, from this, that Judge Wayne considered the right of one party and the obligation of the other as determined by the first part of the clause, not by the words *claim* and *delivery*. Judge Wayne (ib. 647) speaks of the State Legislature as "denying to an owner the right to use a casual opportunity to repossess himself of this kind of property, which there is a right to do in respect to all other kinds of property, where not in the possession of some one else."<sup>2</sup>

Chief Justice Taney said, ib. 626:—"I agree entirely in all that is said in relation to the right of the master, by virtue of the third clause of the second section of the fourth article of the Constitution of the United States, to arrest his fugitive slave in any State wherein he may find him. He has a right, peaceably, to take possession of him and carry him away without any certificate or warrant from a judge of the District or Circuit Court of the United States or from any magistrate of the State, and whoever resists or obstructs him is a wrongdoer, and every State law which proposes directly or indirectly to authorize such resistance or obstruction is null and void and affords no justification to the individual or the officer of the State who acts under it. This right of the master being given by the Constitution of the United States, neither Congress nor a State legislature can by any law or regulation impair it or restrict it." And again, ib. 628, the Chief Justice said:—

<sup>1</sup> *Ante*, § 755.

<sup>2</sup> Yet Judge Wayne said, ib. 640:—"Such a certificate, too, being required, protects persons who are not fugitives from being seized and transported." How can this be if no certificate is necessary? Judge Wayne, in the passage cited in the text above, had spoken of the slave as that which could be seized because *property*. Ib. 641, he said:—"The object is to secure the property of some of the States, and the individual rights of their citizens in that property." Judge

"The Constitution of the United States and every article and clause in it is a part of the law of every State in the Union, and is the paramount law. The right of the master therefore to seize his fugitive slave is the law of each State, and no State has the power to abrogate or alter it."

Judge Thompson's language, already cited,<sup>1</sup> taken in connection with his having concurred in the judgment of the court, supports the same doctrine, even while he asserts the necessity of legislation.

Judge Daniel's language, already cited, is consistent with the doctrine of seizure and removal, by affirming that the Constitution guarantees "to the owner the right of property in his slave."<sup>2</sup>

Judge Baldwin also held that, if the person seized was actually the slave, the removal was not kidnapping.<sup>3</sup>

§ 806. The greater portion of Judge McLean's separate Opinion, in *Prigg's* case, was devoted to an argument against the doctrine.<sup>4</sup> As this Opinion is the most prominent, if not

Taney, *ib.* 629, speaks of the right of the owner as an "individual right," and the provision as "a positive and express stipulation for the security of certain individual rights of property in the several States." This language resembles Judge Baldwin's, in *Johnson v. Tompkins*, *ante*, p. 445, note.

<sup>1</sup> *Ante*, § 758.

<sup>2</sup> *Ante*, p. 489.

<sup>3</sup> *Ante*, p. 491.

<sup>4</sup> 16 Peters, 666, Judge McLean says:—"I come now to a most delicate and important inquiry in this case, and that is, whether the claimant of a fugitive from labor may seize and remove him by force out of the State in which he may be found, in defiance of its laws. I refer not to laws which are in conflict with the Constitution or the act of 1793. Such State laws, I have already said, are void. But I have reference to those laws which regulate the police of the State, maintain the peace of its citizens, and preserve its territory and jurisdiction from acts of violence."

Judge McLean then relates the circumstances of the controversy between Virginia and Pennsylvania, in 1792 (*ante*, § 696). He then says, p. 667:—"Both the Constitution and the act of 1793, require the fugitive from labor to be delivered up on claim being made, by the party or his agent, to whom the service is due. Not that a suit should be regularly instituted. The proceeding authorized by the law is summary and informal. The fugitive is seized by the claimant, and taken before a judge or magistrate within the State, and on proof, parol or written, that he owes labor to the claimant, it is made the duty of the judge or magistrate to give the certificate, which authorizes the removal of the fugitive to the State from whence he absconded."

"The counsel inquire of whom the claim shall be made. And they represent that the fugitive, being at large in the State, is in the custody of no one, nor under the protection of the State; so that the claim cannot be made, and consequently that the claimant may seize the fugitive and remove him out of the State."

"A perusal of the act of Congress obviates the difficulty, and the consequence which is represented as growing out of it."

"The act is framed to meet the supposed case. The fugitive is presumed to be at large, for the claimant is authorized to seize him. After seizure, he is in



the only one, delivered in a case wherein the question was directly in issue, denying the right to seize and remove the fugitive, either under the provision or the Act of Congress, it is given at length in the note below. Some passages in the same extract will hereinafter be cited in considering the question, whether the action of State magistrates, under the law of 1793,

custody; before it, he was not. And the claimant is required to take him before a judicial officer of the State; and it is before such officer his claim is to be made.

"To suppose that the claim is not to be made, and indeed cannot be, unless the fugitive be in the custody or possession of some public officer or individual, is to disregard the letter and spirit of the act of 1793. There is no act in the statute book more precise [668] in its language; and, as it would seem, less liable to misconstruction. In my judgment, there is not the least foundation in the act for the right asserted in the argument, to take the fugitive by force and remove him out of the State.

"Such a proceeding can receive no sanction under the act, for it is in express violation of it. The claimant having seized the fugitive, is required by the act to take him before a federal judge within the State, or a State magistrate within the county, city, or town corporate, within which the seizure was made. Now, can there be any pretence that after the seizure under the statute, the claimant may disregard the other express provision of it, by taking the fugitive without claim out of the State? But it is said, the master may seize his slave wherever he finds him, if by doing so he does not violate the public peace; that the relation of master and slave is not affected by the laws of the State, to which the slave may have fled, and where he is found.

"If the master has a right to seize and remove the slave without claim, he can commit no breach of the peace by using all the force necessary to accomplish his object.

"It is admitted that the rights of the master, so far as regards the services of the slave, are not impaired by this change; but the mode of asserting them, in my opinion, is essentially modified. In the State where the service is due, the master needs no other law than the law of force to control the action of the slave. But can this law be applied by the master in a State which makes the act unlawful?

"Can the master seize his slave and remove him out of the State in disregard of its laws, as he might take his horse which is running at large? This ground is taken in the argument. Is there no difference in principle in these cases?

"The slave, as a sensible and human being, is subject to the local authority into whatsoever jurisdiction he may go. He is answerable under the laws for his acts, and he may claim their protection. The State may protect him against all the world except the claim of his master. Should any one commit lawless violence on the slave, the offender may unquestionably be punished; and should the slave commit murder, he may be detained and punished for it by the State, in disregard of the claim of the [669] master. Being within the jurisdiction of a State, a slave bears a very different relation to it from that of mere property.

"In a State where slavery is allowed, every colored person is presumed to be a slave; and, on the same principle, in a non-slaveholding State, every person is presumed to be free without regard to color. On this principle the States, both slaveholding and non-slaveholding, legislate. The latter may prohibit, as Pennsylvania has done under a certain penalty, the forcible removal of a colored person out of the State. Is such law in conflict with the act of 1793?

"The act of 1793 authorizes a forcible seizure of the slave by the master, not to take him out of the State, but to take him before some judicial officer within it. The act of Pennsylvania punishes a forcible removal of a colored person out of the State. Now, here is no conflict between the law of the State and the law of

involved an exercise of the judicial power. In view of such citation, some words in the extract here given are italicized, though not so printed in the report.

Congress. The execution of neither law can, by any just interpretation, in my opinion, interfere with the execution of the other. The laws in this respect stand in harmony with each other.

"It is very clear that no power to seize and forcibly remove the slave without claim is given by the act of Congress. Can it be exercised under the Constitution? Congress have legislated on the constitutional power, and have directed the mode in which it shall be executed. The act, it is admitted, covers the whole ground; and that it is constitutional there seems to be no reason to doubt. Now, under such circumstances, can the provisions of the act be disregarded, and an assumed power set up under the Constitution? This is believed to be wholly inadmissible by any known rule of construction.

"The terms of the Constitution are general, and, like many other powers in that instrument, require legislation. In the language of this Court in *Martin v. Hunter*, 1 Wheat. Rep. 304, 'the powers of the Constitution are expressed in general terms, leaving to the legislature, from time to time, to adopt its own means to effectuate legitimate objects, and to mould and model the exercise of its powers, as its own wisdom and the public interests should require.'

"This, Congress have done by the act of 1793. It gives a summary and effectual mode of redress to the master, and is he not [670] bound to pursue it? It is the legislative construction of the Constitution; and is it not a most authoritative construction? I was not prepared to hear the counsel contend that, notwithstanding this exposition of the Constitution, and ample remedy provided in the act, the master might disregard the act and set up his right under the Constitution. And having taken this step, it was easy to take another, and say that this right may be asserted by a forcible seizure and removal of the fugitive.

"This would be a most singular constitutional provision. It would extend the remedy by recaption into another sovereignty, which is sanctioned neither by the common law nor the law of nations. If the master may lawfully seize and remove the fugitive out of the State where he may be found, without an exhibition of his claim, he may lawfully resist any force, physical or legal, which the State, or the citizens of the State, may interpose.

"To hold that he must exhibit his claim in case of resistance, is to abandon the ground assumed. He is engaged, it is said, in the lawful prosecution of a constitutional right. All resistance, then, by whomsoever made, or in whatsoever form, must be illegal. Under such circumstances the master needs no proof of his claim, though he might stand in need of additional physical power. Having appealed to this power, he has only to collect a sufficient force to put down all resistance and attain his object. Having done this, he not only stands acquitted and justified; but he has recourse for any injury he may have received in overcoming the resistance.

"If this be a constitutional remedy, it may not always be a peaceful one. But if it be a rightful remedy, that it may be carried to this extent, no one can deny. And if it may be exercised without claim of right, why may it not be resorted to after the unfavorable decision of the judge or magistrate? This would limit the necessity of the exhibition of proof by the master to the single case where the slave was in the actual custody of some public officer. How can this be the true construction of the Constitution? That such a procedure is not sanctioned by the act of 1793 has been shown. That act was passed expressly to guard against acts of force and violence.

"I cannot perceive how any one can doubt that the remedy [671] given in the Constitution, if indeed it give any remedy without legislation, was designed to be a peaceful one; a remedy sanctioned by judicial authority; a remedy guarded by the forms of law. But the inquiry is reiterated, is not the master entitled to his property? I answer that he is. His right is guaranteed by the Constitution, and



§ 807. In Richardson's case (1846), before the Supreme Court of Ohio, Cuyahoga County, 3 West. L. Journal, 563, the defendant was under arrest, charged with violation of the State law, having aided in seizing and carrying out of the

the most summary means for its enforcement is found in the act of Congress. And neither the State nor its citizens can obstruct the prosecution of this right.

"The slave is found in a State where every man, black or white, is presumed to be free; and this State, to preserve the peace of its citizens, and its soil and jurisdiction from acts of violence, has prohibited the forcible abduction of persons of color. Does this law conflict with the Constitution? It clearly does not, in its terms.

"The conflict is supposed to arise out of the prohibition against the forcible removal of persons of color generally, which may include fugitive slaves. *Prima facie* it does not include slaves, as every man within the State is presumed to be free, and there is no provision in the act which embraces slaves. Its language clearly shows, that it was designed to protect free persons of color within the State. But it is admitted, there is no exception as to the forcible removal of slaves. And here the important and most delicate question arises between the power of the State, and the assumed, but not sanctioned, power of the federal government.

"No conflict can arise between the act of Congress and this State law. The conflict can only arise between the forcible acts of the master and the law of the State. The master exhibits no proof of right to the services of the slave, but seizes him and is about to remove him by force. I speak only of the force exerted on the slave. The law of the State presumes him to be free, and prohibits his removal. Now, which shall give way, the master or the State? The law of the State does, in no case, discharge, in the language of the Constitution, the slave from the service of his master.

"It is a most important police regulation. And if the master violate it, is he not amenable? The offence consists in the abduction of a person of color. And this is attempted to be justified upon the simple ground that the slave is property. That a [672] slave is property must be admitted. The State law is not violated by the seizure of the slave by the master, for this is authorized by the act of Congress; but by removing him out of the State by force, and without proof of right, which the act does not authorize. Now, is not this an act which a State may prohibit? The presumption, in a non-slaveholding State, is against the right of the master, and in favor of the freedom of the person he claims. This presumption may be rebutted, but until it is rebutted by the proof required in the act of 1793, and also, in my judgment, by the Constitution, must not the law of the State be respected and obeyed?

"The seizure which the master has the right to make under the act of Congress is for the purpose of taking the slave before an officer. His possession of the slave within the State, under this seizure, is qualified and limited to the subject for which it was made.

"The certificate of right to the service of the slave is undoubtedly for the protection of the master; but it authorizes the removal of the slave out of the State where he was found, to the State from whence he fled. And under the Constitution this authority is valid in all the States.

"The important point is, shall the presumption of right set up by the master, unsustained by any proof, or the presumption which arises from the laws and institutions of the State, prevail? This is the true issue. The sovereignty of the State is on one side, and the asserted interest of the master on the other. That interest is protected by the paramount law, and a special, a summary, and an effectual mode of redress is given. But this mode is not pursued, and the remedy is taken into his own hands by the master.

"The presumption of the State that the colored person is free may be erroneous in fact; and if so, there can be no difficulty in proving it. But may not the

State a negro, "without a right of property in him being first established." It does not appear that any evidence whatever was offered in this case that the person carried away was a fugitive slave.<sup>1</sup> It was held by the court, Wood, Ch. J., and Burchard, J., that all State legislation on the subject is void so far as it interferes with that right to "arrest and return the slave to the State from whence he fled, without the aid of State authority," and the prisoner was discharged. The doctrine is the same which had been affirmed in *Prigg's* case.

§ 808. In the case of *Belt* (1848), 1 *Parker's Cr. R.* 169, he had been seized, without process, in the city of New York, and removed to Gravesend, in Kings county, and there detained, with what design does not appear. The claimant had not applied for a certificate under the statute to any magistrate before he demanded it in making return to the *habeas corpus*. Judge Edmonds, *ibid.* 181, held:—"There was only one case in which a fugitive slave could be held by his master in his personal custody in this State. That was under the law

assertion of the master be erroneous also; and if so, how is his act of force to be remedied? The colored person is taken, and forcibly conveyed beyond the jurisdiction of the State. This force not being authorized by the act of Congress nor by the Constitution, may be prohibited by the State. As the act covers the whole power in the Constitution, and carries out, by special enactments, its provisions, we are, in my judgment, [673] bound by the act. We can no more, under such circumstances, administer a remedy under the Constitution, in disregard of the act, than we can exercise a commercial or other power in disregard of an act of Congress on the same subject.

"This view respects the rights of the master and the rights of the State. It neither jeopardizes nor retards the reclamation of the slave. It removes all State action prejudicial to the rights of the master; and recognizes in the State a power to guard and protect its own jurisdiction, and the peace of its citizens.

"It appears, in the case under consideration, that the State magistrate before whom the fugitive was brought refused to act. In my judgment he was bound to perform the duty required of him by a law paramount to any act, on the same subject, in his own State. But this refusal does not justify the subsequent action of the claimant. He should have taken the fugitive before a judge of the United States, two of whom resided within the State.

"It may be doubted whether the first section of the act of Pennsylvania under which the defendant was indicted, by a fair construction applies to the case under consideration. The decision of the Supreme Court of that State was *pro forma*, and, of course, without examination. Indeed, I suppose, the case has been made up merely to bring the question before this Court. My opinion, therefore, does not rest so much upon the particular law of Pennsylvania, as upon the inherent and sovereign power of a State to protect its jurisdiction and the peace of its citizens, in any and every mode which its discretion shall dictate, which shall not conflict with a defined power of the federal government."

<sup>1</sup> In *Prigg's* case, the jury in the Pennsylvania court, on the trial of the indictment, had found that the woman who had been carried away was a fugitive slave. 16 *Peters*, 556.



of Congress, to take him without delay before the proper authorities in order to obtain the certificate necessary to justify his removal out of the State. This had not been done in this case."<sup>1</sup>

§ 809. In *Norris v. Newton* (May, 1850), 5 McLean's C. C. R. 92, the doctrine of *Prigg's* case was applied, on the authority of that case, by Judge McLean. His language, in charging the jury, p. 97, is:—"Under the act of 1793, the master or his agent had a right to seize his absconding slave wherever he might be found, not to take him out of the State, but to bring him before some judicial officer of the State to make proof of his right to the services of the fugitive. But, by the decision in the case of *Prigg*, the master has a right to seize his slave in any State where he may be found, if he can do so without a breach of the peace, and, without any exhibition of claim or authority, take him back to the State from which he absconded. Believing that this remedy was not necessary to the rights of the master, and, if practically enforced, would produce great excitement in the free States, I dissented from the Opinion of the Court, and stated my objections with whatever force I was able. But I am as fully bound by that decision as if I had assented to it."<sup>2</sup>

<sup>1</sup> Another case in the series affirming the right to seize and remove the slave is *Kauffman v. Oliver* (1849). See the language of Judge Coulter in the citation from this case, *ante*, p. 494. In *Commonwealth v. Taylor* (in the Sessions of Dauphin Co., Pa., 1851), III. Monthly Law Reporter, 576, the right of the owner to seize the slave without warrant was vindicated (see *ante*, p. 73, note). But it is not clear, from the judge's charge, whether he intended to vindicate the seizure for the purpose of removing the fugitive, without a certificate under the Act of Congress, or only as made for the purpose of bringing the claim before a judge or commissioner. The judge speaks of the right of seizure as a right given by the Act of Congress.

<sup>2</sup> The captions of this case in the report are:—"Under the Constitution of the United States, the master of fugitives from labor may arrest them wherever they shall be found, if he can do so without a breach of the peace, and take them back to the State from whence they fled. A State judge, on proper affidavit being made, may issue a writ of habeas corpus, and inquire into the cause of the detention. The affidavit of a colored person is sufficient for this purpose. Every person within the jurisdiction of a State owes to it an allegiance. He is amenable to the laws of the State, and the State is bound to protect him in the exercise of his legal rights. When it appears by the return to the habeas corpus that the fugitives are in the legal custody of the master, and the facts of the return are not denied, there is an end to the jurisdiction of the State judge. His jurisdiction is special and limited. When it appears the fugitives are held under the authority of the Union, it is paramount to that of the State. And so, when an individual is held under the authority of a State, the federal judiciary have no power to re-

§ 810. In Booth's case, 1 Wisc. 1, if the detention of the slave could not have been legal under the warrant in that case by reason of some technical defect,<sup>1</sup> it may have been necessary to inquire whether he could have been kept in custody under the provision alone. Judge Smith, in his Opinion of June 7th, makes the following observations, which bear on this question, in 1 Wisc., p. 15 :<sup>2</sup>

\* lease the person so held. If the return to the habeas corpus be denied, the master must prove that his custody of the slaves is legal. If he fail to do this, or make an insufficient return, the State judge may release the fugitives. But the master may subsequently arrest them and prove them to be his slaves. The master, though he may arrest without any exhibition of claim or judicial sanction, when required, must show a right to the services of the fugitives."

<sup>1</sup> Ante, p. 502.

<sup>2</sup> In the Opinion delivered on the hearing of the *certiorari*, Judge Smith argues against the reasoning in *Prigg's* case, by which the doctrine of seizure is supposed to be sustained, as follows, from 3 Wisc. 116:

"But we will take the case as the majority have presented it, comparing occasionally the opinions delivered, consentient as well as dissentient, with each other, and with those rules of interpretation of the Constitution, which the Supreme Court of the United States has itself long since established, and which have been adopted also, with few exceptions, by the courts of the respective States.

"The first observation which forces itself upon the mind, upon an examination of the case, is, that all the rules of construction theretofore established for the guide of the federal as well as State courts, in the interpretation of the Constitution of the United States, are utterly repudiated.

"Among the rules of interpretation considered to be firmly established, which particularly concern the matter in hand, is the one laid down in 1 *Story's Commentaries*, 409-410. It is as follows:—'A rule of equal importance is, not to enlarge the construction of a given power beyond the fair scope of its terms, merely because the restriction is inconvenient, impolitic, or even mischievous.' Yet the whole tenor and force of the argument in behalf of the assumption of federal authority for the execution of the compact in question, rests solely upon the inconvenience of State action, or the mischief resulting from the omission or refusal of the States to act. What is the 'fair scope of the terms' [117] of the clause? It is submitted that it is clear, definite, incapable of enlargement or restriction. The States have agreed that escaping slaves shall not be discharged from service or labor by the operation of their own laws, but that when claimed within their territory, and the claim established, shall be delivered up. This is the extent of the obligation. Is it not to enlarge the scope of its terms, to hold, that the States have relinquished all power to provide the means and mode of performing this duty?—that they have thrown open their territories to incursion by fugitive hunters, and relinquish all power to protect their own people from false charges of escape, or of the obligation of service?—or from assault and outrage during the search? To hold that the mere covenant not to discharge, and to deliver up on claim, is a grant of power to the federal government to invade their territory and seize—when not one word of grant is found among the terms used, or necessarily implied? And do not the passages heretofore quoted conclusively show, that the power of Congress is deduced solely from the supposition that the clause in question would not probably be conveniently and satisfactorily executed without such assumption?

"Again, the 'fair scope of the terms' of this clause of the Constitution has been enlarged in violation of this rule, in assuming that it conferred upon the slave owner a constitutional right to have his slave restored to him in the State from which he fled. But it is obvious from reading the clause, that it contains no



“Either fortunately or unfortunately, we are left for a construction of this portion of the federal compact, almost exclusively to the meaning to be derived from [16] the words. There was very little debate upon the introduction or adoption of the clause, and but feeble aid is furnished from con-

covenant or guaranty to return the fugitive, but only to deliver him up in the State to which he may have fled and in which he may be found; not to return him to the State from which he may have fled. The Supreme [118] Court of the United States say, ‘that the object of this clause was to secure to the citizens of the slaveholding States the *complete* right and title of ownership in their slaves, as *property*, in every State in the Union into which they might escape from the State where they were held to service or labor.’ It is respectfully submitted, that such was not the object of the clause, but far from it. It was not the object of the clause to legalize slavery in every State of the Union. Such is not now the legal effect of the provision. To give it such a construction would be enlarging the construction beyond the ‘fair scope of its terms.’

“The court say, ‘The object of this clause was, to secure to the citizens of the slaveholding States the *complete* right and title of ownership in their slaves, as *property*, in every State of the Union into which they might escape from servitude.’ Its true design was to guard against the doctrines and principles prevalent in the non-slaveholding States, by preventing them from intermeddling with, or obstructing or abolishing the rights of the owners of slaves.’

“By what rule of interpretation such a construction can be placed upon the words contained in this clause, it is difficult to conceive. The *full* recognition of the right of property in the slave in every State in the Union! The complete right and title of ownership in their slaves as *property*! It is submitted, that the recognition of the rights of the master enjoined by the clause is (1): so far as not to discharge the fugitive from the labor or service which may be due, claimed, and established; and (2) to deliver him up on claim of the person to whom such labor or service is due, when claimed by him, and such claim is legally [119] established. That is all. Such is the bond; no more, no less. The seal may bind, but it cannot enlarge the scope of the bond. The *full* recognition of the rights of the owner in the slave, ‘as *property*,’ and not to obstruct those rights, would greatly enlarge the scope of this provision. The essential rights of the owner of property are, to sell or exchange it; also to use, enjoy, and control it absolutely, without hindrance or molestation. By this construction of the court, therefore, the owner of the fugitive may not only seize him in any State, but he may sell him, at auction or otherwise; he may hire him out to service for any term; he may command his immediate, as well as his prospective services, and lash him into obedience, and none of these rights may be obstructed or ‘intermeddled’ with. Such a construction, if acquiesced in, would open up a market in every free State for fugitive slaves. Placards would be lawfully posted in every corner of the highway, and the service of the slave proposed as compensation or reward for his capture; and such a construction would arm every slave-hunter with a lash, to scourge the fugitive into immediate service, or back to bondage; and no State law or authority could interpose to prevent such outrages, for all such would operate a ‘discharge *pro tanto*.’

“It is submitted that this is going a *little* beyond the ‘fair scope’ of the language of the Constitution. Its fair scope and true intent do not require of the free States any recognition of the right of the owner of the fugitive in him as *property*. That was never required of them, and would have been scouted had it been proposed. The clause simply requires that the States into which the fugitive shall escape shall [120] not discharge him from service, but deliver him up. He is recognized simply as a *person* owing service, not as a *chattel*, or as any species of property to be sold or bartered. In Virginia he may be, indeed, a *chattel*; but in Wisconsin he is a MAN. The laws of Virginia make him a chattel *there*; but

temperaneous interpretation, for, until a comparatively recent period, it has not become a subject of any very considerable discussion.

“Without stopping here to inquire, whether the clause in question confers upon the general government any power of

the Constitution of the United States and the laws of Wisconsin regard him as a *person* here. Under the Constitution, the fugitive leaves the attribute of the chattel behind him in the State from which he flees, and goes forth as a *PERSON*. The law which makes him property in Virginia, does not go with him beyond the limits of that State. On his escape from such limits he ceases to be property, but is a *person* liable to be reclaimed. The *person* may escape, but the *property* cannot. The States are no more bound to recognize the fugitive slave as property, than a fugitive apprentice as property. The relation of master and servant is recognized so far, and so far only, as the obligation of service is implied from such relation. Even such obligation is not recognized as full, complete, present, and operative, but as attaching to that relation in *another State*. So much of the law of the State from which he fled, as required of him *service* to his master *there*, is to be regarded, and from *that* obligation of service, imposed by *that* law, the State may not discharge him. The law of Virginia which requires of the slave service to his master, is recognized as the law *there*, not *here*. We may not discharge a fugitive from the service which, by law, he owes in Virginia. But by that law he owes no service *here*. The master may capture him in Wisconsin. We must deliver him up to his master, on the establishment of his claim; but his master has no right to [121] command his *service* in Wisconsin. He must not beat him. He may take him back to Virginia, but he cannot command his service *here*. When he gets to Virginia he will owe service by the law of that State, but not till then. By the law of that State he owes the service, and by that law only. That is the law of Virginia, but not the law of Wisconsin. If the master demand service *here* of his fugitive, and beat him for disobedience, he is punishable by our laws. Nor could the master, having captured the fugitive in this State, sell or hire him to another. He has just the control over him requisite to his extradition, and no more. He may relinquish that right, and so emancipate him; for such relinquishment would operate emancipation; but he cannot sell and transfer his right of extradition to another. He may employ, *perhaps*, an agent for that purpose; though, strictly construed, the clause might be held to require the claim to be made by the owner *in person*, to whom the service is due, and to exclude the intervention of an agent.

“Such, it seems to me, is the plain meaning of the clause in question. I cannot conceive of any other. And yet, in the same case (*Prigg vs. Penn.*) the court say, ‘the clause contains a positive and unqualified right of the owner in the slave as property, unaffected by any State law or regulation whatsoever, because [122] there is no qualification or restriction of it, to be found therein, and we have no right to insert any which is not expressed, and cannot be fairly implied. Especially are we estopped from so doing when the clause puts the right to service or labor upon the same ground and to the same extent in every other State, as in the State from which the slave escaped, and in which he was held to the service or labor. If this be so, then all the incidents to that right attach also.’

“Now one incident to that right in the State from which the slave has fled, is that the owner may transfer it to another, and therefore no State law or regulation can prevent the exercise of that right in a free State and to the same extent to which the owner is entitled in his own State. The slave code of every State in the Union is thus engrafted upon the laws of every free State, and the latter are prohibited from all legislation on the subject, while the power of legislation, to enlarge or modify this right is in the former. To the ‘same extent’ as the right of the master in the slave is given by the local law of Arkansas, is he entitled to enjoy and exercise it in Wisconsin or Massachusetts! This is insisted upon over



legislation in regard to the subject matter thereof, let us endeavor to arrive at its true intent and meaning, so far as it affects the rights or condition of the class of persons to whom it is supposed especially to refer.

and over in the opinion of the court, and it is claimed that the State courts are bound by the decision. I cannot assent to the proposition.

"Again, it is said that 'the clause contains a positive and unqualified recognition of the right of the owner in the slave unaffected by any State law or regulation whatsoever, because there is no qualification or restriction of it to be found therein; and we have no right to insert any which is not expressed or clearly implied.'

"The rule of construction laid down in numerous instances, [123] which need not to be here specified, is, that the federal government can exercise no power, except what is expressly granted, or what is necessary to the exercise of some express power. We do not require or need restrictive or negative expressions in the Constitution, applicable to federal power. On the contrary, what is not granted is reserved without words of restriction. It was not necessary to insert any restriction upon the rights of the slave owner in this clause, because he had, and could have no rights but such as were *expressly* recognized. Nor without some express grant could Congress exercise any in his behalf. It would have been a work of supererogation to use restrictive words; nay more, it would have been a dangerous expedient, for then it would have been held, and with reason, that all rights and privileges were recognized that were not expressly enumerated among the reservations. As it is, the States, and people, (if it better suits,) have merely assented to the provision that the fugitive should not be discharged by their laws and regulations, but shall be delivered up. Not one word is uttered beyond. To hold that the States have no power or rights but such as are expressly reserved or fairly implied; that restrictions and reservations must be expressed, on the part of the States, or otherwise to be presumed as delegated or relinquished, is to reverse all rules of construction heretofore established. It is a dangerous doctrine. It is repugnant to the express provisions of the tenth amendment of the Constitution itself, which declares the contrary. Is there anything so sacred in the cause of a slave captor as to require a reversal of all rules of interpretation to sustain it? Why should this clause of the Constitution be construed according to rules, and upon principles [124] different from those to which every other part of that instrument is subjected? Why should State sovereignty be degraded in behalf of the slave owner, when every other claimant would approach its tribunals with respect and awe? The doctrine of the U. S. Court is, that because the clause does not restrict the claims of the owner, it therefore recognizes them to any extent allowed in a slave State; that because the States have agreed to recognize *certain* rights, or rather demands, of the slave owner, viz.: that they will not discharge, by law or regulation, a fugitive, and will deliver him up on claim, therefore they admit his whole claim of property; his absolute right to service in their own territory; indeed, all the rights of property and its incidents, to the 'same extent' that he may demand them in a slave State, by the laws thereof; that because they did not restrict the right of the owner to sell the fugitive, or hire him to service, or lash him into obedience, therefore, inasmuch as he had those rights to that extent in the State from which the slave escaped, he must have them in the State into which he may have fled! This is establishing the rule, that the States can exercise no powers which they did not reserve, instead of the acknowledged, the express, the constitutional rule, that the powers not delegated are reserved. This is no unworthy criticism upon the language of the court. It is the doctrine of the opinion from the beginning to the end. It is the basis, the very ground-work of the decision. It is absolutely necessary to the conclusions of the court. To narrow the basis would be to destroy the superstructure. Abridge the premises, and the conclusions scatter. Upon

"Let it be taken for granted, that this clause was intended to refer exclusively to fugitive slaves; of which I think the history of its adoption into the Constitution leaves no doubt; the question at once arises, how far, and in what particulars, does it affect the persons alluded to in it? 1st. It contemplates the fact that certain persons were, or might be, held to service or labor in one or more States under the laws thereof. 2d. That it was by the laws of such State or States alone, under which such persons could be held to service or labor. 3d. That the laws or regulations of the respective States under which such persons might be held to service or labor, or discharged therefrom, might be different. 4th. That such persons might escape from one State in which they were held to labor under the laws thereof, into another State in which such persons were held to labor under different laws, or in which they were by the laws of the State discharged from service or labor. 5th. That the service or labor here spoken of is of a kind which is exacted of such persons by law, and not of a kind stipulated for by contract, and hence is in restraint of, and derogatory [17] to human liberty. 6th. That such persons escaping from one State into another, should not be discharged by the laws of the State to which they may have fled, but that the condition of the fugitive should remain the same in the State from which he had fled, in case the person to whom he owed the service should choose to claim him and convey him thither. 7th. That in the event of a claim by the person to whom the fugitive owed the service under the laws of the State from which he fled, being made, he should be delivered up, on establishing the fact that the labor or service of the fugitive was due to such claimant.

"From this analysis of the clause of the federal Constitution above quoted, it will be seen that the *status* of the fugi-

this ground it was absolutely necessary that the court should plant its decision. No other [125] would serve to sustain it. They did so. To have done less would have been to have done the reverse.

"It may then be asked in all candor if the Supreme Court of the United States, or any other officer or person, can expect the courts of the States to adopt this decision as the law of the land? Do they require obedience to this rule of interpretation? If so, in obeying this we violate all other rules of construction by them established. Fealty to the doctrines of this case is treason to the law of all preceding cases."



tive is essentially different in this State, from his *status* or condition in the State from whence he fled. In the latter, he remained subject to all the disabilities of his class, though he may have escaped from the domicile or premises of his master. Here, he is entitled to the full and complete protection of our laws; as much so as any other human being, so long as he is unclaimed. He may sue and be sued; he may acquire and hold property; he is, to all intents and purposes, a free man, until a lawful claim is made for him; and this claim must be made by the person to whom his service or labor is due, under the laws of the State from which he escaped. No one else can interfere with him. If no *claim* is set up to his service or labor by the person to whom his service or labor is due, there is no power or authority, or person on earth, that can derive any advantage from his former condition, or assert it, to his prejudice. So long as the owner does not choose to assert his *claim*, the cottage of the fugitive in Wisconsin is as much [18] his castle—his property, liberty, and person are as much the subject of legal protection, as those of any other person. Our legal tribunals are as open to his complaint or appeal, as to that of any other man. He *may* never be claimed; and if not, he would remain forever free, and transmit freedom to his posterity born on our soil.

"It is apparent, therefore, that the fugitive slave leaves his condition of slavery behind him, and takes with him into this State only the dread contingency of the assertion of the claim of the person from whose service he has escaped, upon the establishment of which he may be reduced to his former condition in the State from which he fled.

"The act of Congress of 1850 fully recognizes this view of the Constitution, and contemplates the recapture of the fugitive, as dependent entirely upon the *claim* of the master. The sixth section provides that 'the person or persons to whom such service or labor may be due, or his, her, or their agent or attorney, duly authorized by power of attorney, *in writing*, acknowledged and certified under the seal of some legal officer or court of the State or Territory in which the same may be executed, may pursue and claim such fugitive

person,' &c. No one but the owner, or his agent or attorney, appointed by writing, may claim him. No one may volunteer to render his neighbor a friendly service, by capturing in his behalf and returning to him his fugitive. It must be the master's own act, and its responsibilities be all his own."

Afterwards, on p. 37, Judge Smith argues that the provision contemplates a claim to be judicially determined, in contrast to such a claim as is made by a mere seizure. This part of the Opinion will be cited in another place.<sup>1</sup>

§ 811. In *Ex parte* Bushnell, *Ex parte* Langston, 9 Ohio, 77, the parties had both been indicted, in the United States District Court, for having rescued a negro from the custody of the agent of the alleged owner, who, in the words of the indictments, did "pursue and reclaim the said negro slave, called John, he then and there being a fugitive person as aforesaid, and still held to service and labor as aforesaid, by then and there, on the day and year last aforesaid, at the district aforesaid, and within the jurisdiction of this court, seizing and arresting him as a fugitive person from service and labor from the said State of Kentucky;" and it is further stated in the indictment that the said slave was then and there "lawfully, pursuant to the authority of the statute of the United States, given and declared, in such case made and provided, arrested, in the custody and under the control" of the said agent, &c. No process or warrant in the hands of such agent is mentioned.<sup>2</sup>

Judges Swan and Peck, maintaining the power of Congress to legislate, seem to consider only whether Congress had power to pass a law to protect those who might hold in their custody escaped slaves, and, considering the right to seize and remove as having been given by the Constitution, they regard the seventh section of the Act, under which the relators had been indicted,

<sup>1</sup> See *post* in Ch. XXIX. among cases on the question whether the action of the United States Commissioners involves an exercise of the judicial power.

<sup>2</sup> Mr. Wolcott, Attorney-General for the State, argues the case as if the indictments in the United States Court were under a statute for protecting a right to seize and remove the fugitive given by the Constitution, not under a statute for protecting a right to arrest for the purpose of prosecuting the claim according to Act of Congress. He assumes that such a right, under the Constitution, must exist as a foundation for the action of Congress, 9 Oh. 110. His argument against the right, as declared in *Prigg's* case, is found *ib.*, 146-150.



as intended to protect this right. Hence, Swan, Ch. J., did not consider it necessary to examine into the validity of other provisions in the Act of 1850. 9 Ohio, 184, 185. And Judge Peck, ib. 213, referring to the position of the Chief Justice, says:—“Nor indeed can the relators be liberated under such a return upon habeas corpus if, under any circumstances, such a rescue would be unlawful and punishable under the Act of 1850. The uniform current of all the authorities has heretofore been, and I am not aware of a single exception, that under the constitutional provision the master may, if he can do so without a breach of the peace, take possession of his fugitive slave; and many other cases may be supposed in which the custody of the owner, for the time, would be lawful, and which the relators would have no right to disturb. If these positions of the Chief Justice are true, and it seems to me that they are so, the objections to the law of 1850, because it does not accord a jury trial to the fugitive before his extradition, and permits a seizure and removal under a warrant of a Commissioner of the Circuit Court, cannot avail the relators, even though those provisions should be regarded as unconstitutional.”

But, since the statute connects a seizure without process with a subsequent taking before a court, a judge, or a commissioner, it is evident that the doctrine of a right of seizure and removal under the Constitution was not involved in this case.<sup>1</sup>

§ 812. The direct judgment of the Supreme Court in *Prigg's* case, confirmed by repeated *dicta* in later cases, will probably continue to be received as controlling authority on this point. The following considerations are offered by way of comparing the doctrine of that case with the conclusion indicated by a just application of principles hereinbefore stated.<sup>2</sup>

The words “no person held to service or labor in one State,

<sup>1</sup> The question might be made, whether any one would be indictable under this statute for obstructing another who should endeavor to remove out of the State the person claimed as owing service, without going before a judge or commissioner. Perhaps an objection might have been sustained against the first count of the indictments in the cases of *Bushnell* and *Langston*, that it did not state that the negro was seized and held for that intent. There was another count in the indictment against *Langston*, charging rescue when the slave was held under a commissioner's warrant.

<sup>2</sup> In Chapters XX. and XXI.

under the laws thereof, escaping into another, shall, in consequence of any law or regulation therein, be discharged from such service or labor," might, it would seem, have been used to describe an *obligation*—the obligation of the fugitive. It is admitted by all that the words, "shall be delivered up on claim of the party to whom such service or labor may be due," describe a *right*—the right of the person to whom the obligation is due. The words which are descriptive of the right are connected, by the conjunction "but," with the words which may have been used to describe an obligation. They therefore may have been used to describe a right and an obligation as correlative, and, on the principle of interpreting words and clauses by their context, there is a presumption that they were so used. Under this view, the extent of "shall not be discharged" is limited by that of "shall be delivered up on claim," not merely because they are part of the context immediately in connection, but because the latter words, in being descriptive of the right, limit the former as descriptive of the obligation.

It would be a very loose interpretation of the terms to say that a claim *in pais* sufficiently answers the words of the provision, and that when one private person seizes another as his fugitive bondman a "claim" is made, and that such fugitive may be said to have been "delivered up on claim," when the person thus claiming his service has been allowed without molestation to carry him away from the jurisdiction of the State wherein he is found. In Judge Story's argument for the legislation of Congress, it is taken for granted that delivering up on claim is an active duty, either of the national Government or of the State in which the fugitive is found, and that, when a claim is made, some further remedial action is contemplated than that which may be performed by the agency of the claimant himself. The fact that *delivering-up* is enjoined in connection with a *claim*, indicates that a proceeding before some organ of public authority is intended, in distinction from such a claim *in pais*.

§ 813. The Articles of Confederation contained no provision *in pari materia* which might be referred to for the inter-



pretation or construction of this provision. The provision in the Articles of the two Confederations of the New England colonies was in force at a time when slavery and indentured servitude was sanctioned by local law in those colonies. So far as a master's right to reclaim his fugitive slave depended upon this compact, it is clear that the claim was to be made before some public officer,<sup>1</sup> though it is probable that the non-resident master could, in those colonies, also seize and remove the fugitive from his service; as a person in any of the present slaveholding States may now do in like circumstances.

§ 814. The assertion of a right to seize and remove the fugitive from labor is consistent with the doctrine that in this provision slaves are recognized as property—as chattels—not as persons; but that assertion is not altogether dependent on the recognition of this doctrine. Judge Story supposed the slave might be seized as a *person*, if not as property. He compared the master's right under the provision to the right which a father has, at common law, to the custody of his child, or that of a master over the person of his indentured minor apprentice, by the law of their domicil.<sup>2</sup>

<sup>1</sup> See *ante*, Vol. I. p. 268, note 5 [b].

<sup>2</sup> 16 Peters, 613; *ante* p. 463. In the case cited *ante*, p. 561, Judge McLean recognized the authority of Prigg's case for the doctrine of seizure, yet he said in McQuerry's case (5 McLean, 482):—"Under the Constitution and Act of Congress the inquiry is not, strictly speaking, whether the person be a slave or a freeman, but whether he owe service to the claimant. This would be the precise question in the case of an apprentice." This means, if anything, that the fugitive is recognized as a person and not as property. In *Jones v. Van Zandt*, 2 McLean, 602, he had said:—"The Constitution treats of slaves as persons. The view of Mr. Madison, who 'thought it wrong to admit in the Constitution the idea that there could be property in men,' seems to have been carried out in that most important instrument. Whether slaves are referred to in it as the basis of representation, as migrating or being imported, or as fugitives from labor, they are spoken of as persons."

In *Groves v. Slaughter*, 15 Peters, 506, McLean, J., said:—"The Constitution treats slaves as persons. In the 2d section of the 1st Article, which apportions representatives and directs taxes among the States, it provides, 'The numbers shall be determined by adding to the whole number of free persons, including those bound to service for a term of years, and excluding Indians not taxed, three fifths of all other persons.' And again, in the 3d section of the 4th Article, it is declared that 'no person held to service,' &c. By the laws of certain States, slaves are treated as property; and the Constitution of Mississippi prohibits their being brought into that State by citizens of other States for sale or as merchandise. Merchandise is a comprehensive term, and may include every article of traffic, whether foreign or domestic, which is properly embraced by a commercial regulation. But if slaves are considered in some of the States as merchandise, that cannot divest them of the leading and controlling quality of persons, by which they are designated in the Constitution. The character of property is

In later instances it has been held that the fugitive slave is seized and removed as a chattel;<sup>1</sup> and the right to do this being attributed to this provision, it is urged that the Constitution recognizes the person owing service or labor as being a chattel and not a legal person.<sup>2</sup> Some even appear to hold that only as chattels can *slaves* be recovered under this provision, and that legal persons owing service and labor are not comprehended in its terms.<sup>3</sup>

So far as any argument has been offered to support the assertion that any natural persons are in this provision recognized as chattels, it is, logically speaking, a fallacy, such as has been indicated in the first volume.<sup>4</sup> It is palpable, from the history of slavery in Europe, that persons have been held to service and labor while their legal personality has been recognized.<sup>5</sup>

given them by the local law. This law is respected, and all rights under it are protected by the federal authorities, but the Constitution acts upon slaves as persons, and not as property."

Judge Baldwin, who in this case delivered a dissenting Opinion, in which he held that slaves were to be recognized as merchandise by the States and the national Government, confessed that he stood "alone among the members of the court." He says (ib. 512):—"Other judges consider the Constitution as referring to slaves only as persons, and as property in no other sense than as persons escaping from service; they do not consider them to be recognized as subjects of commerce, either with foreign nations or among the several States; but I cannot acquiesce in this position. In other times, and in another department of this Government, I have expressed my opinion on this subject; I have done it in judgment in another place,—1 Bald. R., 576, &c.,—and feel it a duty to do it here, however unexpectedly the occasion may have arisen; and to speak plainly and explicitly, however unsuited to the spirit of the times, or prevalent opinions anywhere, or by any persons, my views may be. That I may stand alone among the members of this court does not deter me from declaring that I feel bound to consider slaves as property, by the law of the States before the adoption of the Constitution, and from the first settlement of the colonies; that this right of property exists independently of the Constitution, which does not create but recognizes and protects it from violation, by any law or regulation of any State in the cases to which the Constitution applies." His language throughout is singularly strong on this point. The reasons he gives for his decision, he says (ib. 517), "are drawn from those principles on which alone this Government must be sustained; the leading one of which is, that wherever slavery exists by the laws of a State, slaves are property in every constitutional sense, and for every purpose, whether as subjects of taxation, as the basis of representation, as articles of commerce, or fugitives from service." If this should be held in the literal sense, slaves could not form part of the basis of representation nor be delivered up as persons escaping.

<sup>1</sup> See Woodbury, J., in *Jones v. Van Zandt*, 5 How. 229; *ante*, p. 493, note. *Kauffman v. Oliver*, 10 Barr, 516; *ante*, p. 494.

<sup>2</sup> On Judge Taney's inferences in *Dred Scott's* case, from this interpretation of the clause. See *ante*, Vol. I., p. 566, note 3.

<sup>3</sup> Compare authorities which exclude apprentices from the extent of the provision, *ante*, § 712.

<sup>4</sup> *Ante*, Vol. I., p. 560.

<sup>5</sup> *Ante*, §§ 160-162.



§ 815. Judge Story's deduction of the right to seize and remove the fugitive from labor is based entirely on interpreting the words which may have been intended to describe the obligation of the fugitive, without reference to the words which he regarded as describing the right of the claimant. In speaking of the whole provision under the designation "the clause," he says it "manifestly contemplates the existence of a positive unqualified right on the part of the owner of the slave, which no State law or regulation can in any way qualify, regulate, control, or restrain." The existence of a positive right under this provision in the person to whom the service or labor is due by the law of the State from which the bondman escaped—a right which cannot be modified by the law of the State in which he is found—follows of course from construing the provision as positive law, or as it is regarded under the fourth construction. But Judge Story declared<sup>1</sup> this in connection with the proposition—"The slave is not to be discharged from service or labor in consequence of any State law or regulation." He said:—"Now, certainly, without indulging in any nicety of criticism on words, it may fairly and reasonably be said that any State law or State regulation which interrupts, limits, delays, or postpones the right of the owner to the immediate possession of the slave and the immediate command of his service and labor, operates, *pro tanto*, a discharge of the slave therefrom."

By thus resting the right to seize and remove upon the words, "shall not be discharged from such service or labor," Judge Story declared, in effect, that the relation in which the debt of service existed was the same in the forum of jurisdiction as in the State by whose law the fugitive had been held to service. This he also asserted in these terms:—"The clause puts the right to the service or labor upon the same ground and to the same extent in every other State as in the State from which the slave escaped and in which he is held to service or labor."<sup>2</sup>

<sup>1</sup> 16 Peters, 612; *ante*, p. 463.

<sup>2</sup> See a similar assertion by Judge Shaw in *Sims' case*, 7 Cushing, 295, *ante*, p. 498. The cases in which it has been held that the provision does not extend to the issue of fugitive slave women are authorities against the doctrine that the status con-

Judge Story has not offered the slightest argument for this all-controlling interpretation of the words "shall not be discharged." If he has produced anything, by way of construction of the whole provision, to support the doctrine, it is by supposing a discovery of the intention of the framers of the Constitution, as known, not from the words of the instrument, but from history. But there is no evidence to support such assertion of intention.<sup>1</sup>

§ 816. It has already been shown that, in ascertaining the intention of those from whom these provisions derive their authority, reference must be had to the pre-existing law, or that which, in their absence, would have continued to determine the relations of the parties in the circumstances therein anticipated. The doctrine that under this clause persons held to service or labor are recognized as property, in distinction from legal persons, and the connected doctrine—that the sum total of the rights and obligations of the bondman and the person to whom his service or labor may be due continue, in the State wherein the fugitive is found, to be such as they were in the State from which he escaped—may be traced, in part, to the vagueness of the terms *slaves* and *slavery*, which are popularly used as equivalents for "persons held to service or labor," and the condition of being so held, and, in part, to the incorrectness of forms of speech used to describe the international recognition in one forum of rights and obligations incident to relations which first existed in another.

An instance of this incorrectness of speech occurs in the provision itself which is under consideration. For where, in the absence of this provision, a fugitive would be discharged from the service or labor in which he had been held in another

tinues in the State in which the fugitive is found. See *ante*, § 723. They are also authority against the doctrine that the fugitive is recognized as property.

<sup>1</sup> "Historically, it is well known that the object of this clause was to secure to the citizens of the slaveholding States the complete right and title of ownership in their slaves as property in every State," &c. 16 Peters, 611, *ante*, p. 461. Judge Wayne said:—"The provision was called [meaning, apparently, in the convention] a guarantee of a right of property in fugitive slaves wherever they might be found in the Union." 16 Peters, 639. Judge Wayne's Opinion is crowded with assertions, unsupported by argument or historical reference, that it was intended in the Constitution to recognize slaves as property and as property only. See *ib.* 638, 639, 641, 642, 647.



State, the *discharge* would not be caused by any law or regulation of the State into which he had escaped. He would be discharged by the fact that the law under which he had been held to service or labor had no extent or operation in the State into which he had escaped.

If the fugitive is, in the State into which he may escape, held to any obligations, they can only be such as are created either by this provision or by the local law of that State. So far as this provision does not create an obligation to service, the law of the State operates *pro tanto*. But that law may not create any such obligation; in which case the only obligation to service is that created by the provision; and as to all former obligations, they are discharged *pro tanto* by the fact of escape.

At a time when slavery was a status known to the law of nations, or universal jurisprudence, it had, in each forum, international recognition as the same status, and was, of necessity, absolute or chattel slavery.<sup>1</sup> When it ceased to be attributable to this law of nations, or universal jurisprudence, the question was no longer of the recognition of a status which, if recognized, was everywhere the same, but of the recognition of certain several rights and correlative obligations of master and slave according to the law of their domicile; and on the principle of comity, so called, these were to be sustained, if not inconsistent with rights and obligations attributed by the local law universally, *i. e.*, to all natural persons.<sup>2</sup> But, in a forum where the local law by its otherwise universal attribution of rights prevents the judicial recognition of the involuntary obligations of the bondman from another jurisdiction, the only rights which the master can claim are those described in the words of some statute or treaty. It matters not that in the place of domicile the relation between the master and slave included other rights and obligations. Except as the words of such statute or treaty support the owner's rights, the slave is, by the law of the forum, discharged, *pro tanto*, from his involuntary obligations.

In each State of the Union the status of all persons is pre-

<sup>1</sup> *Ante*, § 112.

<sup>2</sup> *Ante*, § 114.

sumptively determined by the "reserved" powers of the States, until an exception can be proved, against the operation of those powers, from the words of the Constitution of the United States. Even admitting that the persons designated are of the same status in the State wherein found as in the State from which they escaped, and this by law of national authority, yet that law has only personal extent and *quasi-international* effect as between the States. It applies to persons only as aliens to the State wherein they are found, and, since no persons can be presumed to be aliens,<sup>1</sup> the local law must be presumed to determine their personal rights until it is proved that they are the persons to whom this national law extends.

There is therefore a presumption of public law against an extensive construction of this provision, and in each State wherein the local law attributes personal freedom universally, as a natural right, the presumption in favor of liberty, a presumption of private law, is against the same construction.<sup>2</sup>

Hence, though the fugitive continues to owe a debt of service or labor in the State from which he may have escaped, and though that debt can be enforced only by the custody of his person, yet the relation which existed between the fugitive and the person to whom his service or labor is due, under the law of the State from which the fugitive escaped, does not have, under this provision, the recognition which relations attributed to the *law of nations*, such as those of husband and wife, parent and child, or relations attributed to the customary law of England and America, may have under unwritten private international law.<sup>3</sup> The relation be-

<sup>1</sup> Nelson, J., in *re Kaine*, 14 Howard, 141:—"Under our system of laws and principles of government, so far as respects personal security and personal freedom, I know of no distinction between the citizen and the alien who has sought an asylum under them." See Opinion of Thatcher, J., in *Commonw. v. Griffith*, 2 Pick. p. 20, *ante* p. 553.

<sup>2</sup> *Ante*, §§ 702, 703.

<sup>3</sup> Such as relations of master and apprentice, bail and principal, which may, perhaps, have been internationally recognized as between the States under common-law principles, independently of this provision. *Respub. v. Goaler of, &c.* (1798), 2 Yeates, 265. By the court:—"The passage cited from Vattel applies merely to nations entirely independent on each other. The question is not now before us whether, if bail be entered in a foreign jurisdiction, the manucaptor there can come into this State and legally take the principal. In the relation in which the several States composing the Union stand to each other [compare the doctrine noted *ante*, p. 369, n. 3], the bail in a suit entered in another State



tween them in the State where the fugitive is found is determined only by the words of this provision, which creates a new right and obligation in the specified circumstances, and the right of the claimant is not the same right which, as owner or master, he had in the State by whose law the fugitive was held to his service.

The debt of service or labor, with the correlative right to have the fugitive delivered up on claim, being secured by this provision, the local law of the State in which he is found operates as to all the rest, *pro tanto*, determining all the rights and obligations of the parties consistent with *delivery of the fugitive on claim*. That law may, or may not, recognize any of the former disabilities of the fugitive, and it may attribute to him any right, subordinately to the claim. In a State where involuntary servitude is not recognized by the local law, the slave who has escaped into it is as free as any other inhabitant until such claim is made as is contemplated by this provision. The interpretation of the word shows that claim before public authority is intended, and therefore he cannot be seized and removed, as he might, in the State from which he escaped, have been carried from one county to another.<sup>1</sup>

A bond status in the place of domicile may consist of a variety of disabilities, besides being obliged as a legal person

have a right to seize and take the principal in a sister State, provided it does not interfere with the interests of other persons who have arrested such principal." In *Commonw. v. Griffith*, 2 Pick. 17, where the question was of the seizure without warrant, but only for the purpose of bringing the fugitive before a magistrate, the counsel for claimant argued that the relation of a slave to his owner may be compared to that between master and apprentice, parent and child, in which no warrant is necessary. This was assuming that the relation was the same under the provision as it had been in the State from which the escape was made.

<sup>1</sup>In an article by Conway Robinson, Esq., of Richmond, Va., in the *Southern Literary Messenger*, Jan. 7, 1840, vol. VI., p. 100, and also in Vol. 23 *Am. Jurist*, it is maintained that, "The owner's property being thus secured and protected by the Constitution, he has the same right to take possession of his slave when he finds him in the State to which he escapes, that he would have in the State from which he escaped. As, upon an escape from one county into another, of the same State, the owner may take possession of his slave in the latter county without any warrant or process whatever, so, upon an escape from one State into another of this Union the owner may, in like manner, under the Constitution which governs the Union, take possession of his slave without any warrant or process." This essay was the only juristical essay on the subject, and was well known to all conversant with this branch of jurisprudence, at the date of *Prigg's case*, 1842, and may have influenced opinions on that occasion.

to render service or labor on claim being made before public authority. The fugitive from labor may be either a chattel or a legal person by the laws of the State in which he has been held in bondage. The provision guards only his obligation, as a legal person, to respond, *on claim*, against the discharging effect which follows on the fact of his escape from that State. To that end only it takes up and gives a personal extent to the law of that State. In all other respects he is discharged *pro tanto* from the effects of that law, and whether he will be liable to any other obligation of his former condition will depend on the private international law of the forum, that law which in its authority is identified with the local law of the State.

§ 817. Having said, on page 613 of the report, that, "under and in virtue of the Constitution, the owner of a slave is clothed with entire authority, in every State in the Union, to seize and recapture his slave whenever he can do it without any breach of the peace or any illegal violence," Judge Story adds:—"In this sense and to this extent this clause of the Constitution may properly be said to execute itself."

Positive law is always, of necessity, producing between the persons upon whom it operates, relations in respect to persons and in respect to things. In this respect it may be said to be always executing itself. But rights and duties are manifested in some action, and, so far as they involve the action of some private person, the law may be said to be unexecuted until that action has been performed. Whenever the action is performed, by the person to whom it is permitted or of whom it is required, without the intervention of remedial process of law applied by public authority, the law giving the right or requiring the duty may still more appropriately be said to execute itself. But whether the action may so be performed, without such intervention, depends firstly—upon the nature of the *object* of the action,<sup>1</sup> whether a person or a thing; and, secondly—if the object is a person, upon the rights which may be attributed to (the capacity of) that person; and, if a thing, upon the rights which may be attributed to other persons (other than the actor) in respect to it.

<sup>1</sup> *Ante*, § 21.



Under the fourth construction, the provision operates as positive law, establishes a relation between private persons, and, to that extent, executes itself. If the provision declared that the escaped slave should, in the State in which he is found, be regarded as a chattel or thing, which can only be the object of the rights of legal persons, the necessary consequence might be that he could be seized and carried away by the claimant, unless rights of other persons in respect to the same chattel should exist to delay possession. If the provision declared that the fugitive bondman, as legal person, should, in the State in which he is found, be in the same relation towards the owner as before in the State from which he fled, the same absolute right of possession would be vested in the owner which he had in the State of domicil, and, the slave not deriving any right from the local law of the State in which he is found, the master might seize him and acquire legal possession. The continued possession could be contested only as the parent's, master's, or manucaptor's custody, of a minor child, an apprentice, or the bail, might be under the local law; and in such case the provision might properly be said to execute itself; the action involved in the right of the master, as recognized by the provision, being then lawfully performed without intervention of remedial coercion by public authority.

But the provision does not know the fugitive as a chattel, and the law of the State in which he is found may attribute to him any right whatever, subject only to claim to be made by the master for his person to fulfill his debt of service or labor, the just extent of which disability has been considered. Therefore, in a State wherein, but for this provision, he would have been "discharged from such service or labor," the escaped slave is a legal person, and has a right to personal liberty given him by the local law, which he does not lose until such claim has been made. Whether, under the provision, he may be arrested without warrant for the purpose of being taken before public authority to answer to the claim, is a different question; but, in such a State, the local bill of rights extends to him as well as another, at least so far as to make his seizure and removal by the owner illegal. It cannot be

done, in such a State, "without any breach of the peace or illegal violence," because the law of the State declares it to be illegal violence and a breach of the peace, and therein the provision does not restrict the local law.'

§ 818. As has already been noticed,<sup>1</sup> the Supreme Court, in *Kentucky v. Dennison*, cannot be supposed to base the legislation of Congress respecting fugitives from justice on the theory of carrying into execution the judicial power of the United States in a "case" arising under the provision in the Constitution for the delivery of such persons on demand. Indeed, the portion of the Opinion delivered by the Chief Justice, which vindicates the legislation of 1793 on that subject, does not correspond with any justification previously advanced for the action of Congress in reference either to this provision or that relating to fugitives from labor. Judge Taney there speaks of the legislation of 1793 in respect to fugitives from justice as founded on the power specially granted in the first section of the Fourth Article; holding that Congress had thereby (in the language of that section) *prescribed the manner in which a judicial proceeding* of the State from which the fugitive from justice had escaped, to which *full faith and credit* was to be given in the State into which he had fled, should be proved in the latter, and *the effect thereof*. Indeed the Chief Justice says that "without doubt," this provision respecting fugitives from justice "which requires official communications between States and the authentication of official documents, was in the minds of the framers of the Constitution, and had its influence in inducing them to give this power [the power conferred by the 1st sec. of the 4th Art.] to Congress."<sup>2</sup>

This theory for the legislation of Congress corresponds better with the fourth than with any other of the constructions of these provisions which have been indicated, inasmuch as the

<sup>1</sup> Under this view of the nature of the master's right under the provision, it is not necessary to inquire whether such seizure and removal will not be contrary to those amendments of the Constitution of the U. S. which are in the nature of a bill of rights. The effect of those amendments, as limiting all that may be done under color of the authority of the U. S. for carrying the provision into effect, will be considered in another place.

<sup>2</sup> *Ante*, p. 434, note.

<sup>3</sup> *Ante*, p. 430.



judicial power of the State, from whose justice the person charged has fled, is supposed to operate before the power of Congress can be brought into action. If it does so operate it must be in applying some law. If the law applied is only the law of the State in which the crime was committed, and if the judicial proceeding of that State, being proved, and having taken effect, or having received full faith and credit under the first section of the fourth Article, is sufficient for the purpose of delivering up the fugitive from justice,—of what use, it may be asked, is the provision for that delivery in the second section? It would seem that the law applied could be no other than a law of national authority and extent, contained in the provision itself, acting on the fugitive as its subject, conformably with the fourth construction. But though the State courts may apply such a law in the exercise of the concurrent judicial power of the State, it is evident that this power can itself extend only to persons within the jurisdiction of the State. Besides, the return of a criminal to the State from which he had fled could have been required only by a law of national authority and extent: it was not within the “original” powers of the demanding State “previous to the Constitution,” and therefore it is not, according to the greater number of authorities, within the concurrent judicial power of that State.<sup>1</sup>

§ 819. Under this view of the legislative power of Congress in reference to this matter, an effect is attributed to this provision very similar to that which, in asserting the right to seize and remove a fugitive slave, is attributed to the other provision. As, in that instance, the law of personal condition of the State from which the fugitive from service escaped is supposed to operate in another State, so, here, the criminal law of the State from which the person charged fled is supposed to operate in another State, so that while it is judicially administered in the former State it may be ministerially executed in the latter. It would be perfectly consistent with this view if some other person, whether an officer sent by the Executive of the demanding State, or some United States Commissioner, or a

<sup>1</sup> *Ante*, Vol. I., p. 492.

United States Marshal, should be indicated by Congress as the person to make the delivery : for, as the provision does not indicate the person who shall make the delivery, it would appear, notwithstanding the argument of the Chief Justice that the Governor is the person contemplated,<sup>1</sup> that any person who might be empowered to execute any other provision of the national law might be enabled to enforce this.

§ 820. But if this consequence is not involved in Judge Taney's justification of the legislation of Congress, it would still seem that, under that view, *legal* operation or effect, altogether beyond any effect *as evidence*, had been given in a State to a judicial proceeding of another State ; and whether this can be done is, at the least, a matter of much doubt,<sup>2</sup> and besides, since the person affected by the judicial proceeding was beyond the jurisdiction of the State in which it was rendered, it would appear that it could not, under the decisions, have "effect," even as evidence, in other States.<sup>3</sup>

§ 821. If either of these provisions is to receive the fourth construction it would appear that, in being part of the supreme law of the land, it binds all persons, private as well as public, and that the rights and obligations created by it might be maintained and enforced by the instrumentality of any whose office it may be, in any jurisdiction within the United States, to apply that law.

The judicial power of the United States extends to all *cases arising under the Constitution*. The question occurs whether, independently of any statute on the subject, the demand of a State for the delivery of a fugitive from justice, or the claim of a private owner for the delivery of a fugitive bondman, constitutes a *case* within the judicial power of the United States and within the concurrent judicial power of the several States?

The question—of the exercise of judicial power—which is here considered, is not whether the statutes which Congress should pass, in the exercise of an express or implied power to carry these provisions into effect, would not be a law, applica-

<sup>1</sup> On which argument see *ante*, p. 549, note.

<sup>2</sup> See *ante*, pp. 257-260.

<sup>3</sup> *Ante*, p. 246.



ble by the judicial power of the United States and the concurrent judicial power of the States. It is, whether these provisions operate as private law on the fugitive from justice or from labor, and, irrespectively of legislation, may be enforced by the judicial power of the United States or of the several States; and, if they may be so enforced, whether there are any constitutional restrictions on the manner in which such power may be applied?

§ 822. And first, as to a demand for the delivery of a fugitive from justice.

If by Act of Congress the power to deliver up a fugitive from justice, on demand, has been vested in persons who cannot under the Constitution of the United States hold the judicial power of the United States, and who cannot under the Constitution of a State hold the judicial power of the State, such Act of Congress and the adjudged cases which support it may be authorities to show that a case within the judicial power does not arise on such demand. This class of authority will be presented in the next chapter, where the constitutionality of the Act of Congress of 1793, in view of the investiture of the judicial power of the United States, is examined.

The opinion of Kent, which has been given among the authorities on the construction of this provision,<sup>1</sup> seems to support the view that the demand and delivery of a fugitive from justice would be within the judicial power. But it is doubtful whether that author intended to say that such would be the case under the Constitution alone, independently of legislation, or only that by and under such legislation it could be made a proper subject for the action of the judiciary.

Other juristical authority, taking the same view, may be found in the opinion of those members of Congress who may have supported the bill on this subject which was rejected in the House of Representatives, March 1, 1861.<sup>2</sup>

But if any authorities support the doctrine that a case within the judicial power arises under the provision itself when a claim can be made for the delivery of a fugitive from

<sup>1</sup> *Ante*, § 733.

<sup>2</sup> *Ante*, p. 425, note.

labor, they also, to some extent, support the same theory in respect to fugitives from justice; at least so far as they declare that operation of the two provisions is in all respects parallel.

§ 823. Under any construction of this provision, the right created is a right of the State from which the person charged had fled; it can hardly be said to be the right of "the executive authority" designated as the proper person to make the demand. If the provision should receive the second construction, and be taken to act on the State into which the fugitive from justice had escaped, creating a duty for such State correlative to the right of the State from which he fled, the *refusal* of the former to perform its duty might give rise to a controversy between the two States, to which the judicial power of the United States should extend by the express terms of Art. III., sec. 2. But on the *demand* alone, a controversy could hardly be said to arise between the supposed States.

But under the fourth construction the obligation correlative to the right is due by the fugitive himself. The "case" which arises under the Constitution, and which is within the judicial power, is, if it be such, a case, between the demandant State, or demandant Executive, and the person charged. The judicial power would not, under this view, determine the rights and obligations of the State in which the person charged is found, but the rights and obligations of that person—a private individual. In this view, therefore, there is nothing in the eleventh Amendment to remove the supposed case from the extent of the judicial power of the United States.

§ 824. A construction of this constitutional provision by the analogous article in the compact of the New England colonies of 1648, if allowable, may afford an argument in favor of the view here suggested. By that article, the demand for a fugitive criminal was to be made upon "the magistrate or some of them, where for the present the said prisoner abideth," who was to order the delivery.<sup>1</sup> But the word "magistrate" at that period appears to have been used indifferently for all public functionaries, and the judicial and executive functions were not so distinctly separated as in later times.

<sup>1</sup> See *ante*, Vol. I., p. 269, note [c].



§ 825. Secondly, as to a claim for the delivery of a fugitive from labor.

If, by any legislation of Congress, the power to carry out the object of the other provision, by delivering up a fugitive from labor on claim, has been conferred on persons who cannot under the Constitution be invested with the judicial power of the United States, such legislation, and the adjudged cases which support it, are authorities to show that such delivery on claim does not properly belong to the judicial power. This class of authorities will be presented in another chapter when the constitutionality of the laws of Congress on this subject is examined.<sup>1</sup>

§ 826. With the exception of the dictum of Chancellor Walworth, in *Jack v. Martin*,<sup>2</sup> there is probably no judicial opinion which can be cited in support of the doctrine that the claim of a master under this provision may be enforced, and a delivery made to him by the ordinary courts of the United States and of the several States, independently of any legislation. The doctrine seems, however, to be necessarily involved in maintaining the power of Congress to legislate as power to carry into effect the power of the judicial department of the United States. The authorities supporting that basis of legislation will be noticed in the latter part of this chapter.<sup>3</sup>

§ 827. The exercise of judicial power by a State court is determined either by antecedent judicial usage or by the State legislation. The exercise of the judicial power of the United States is distinguishable according to the nature of the rights and obligations which are the subject-matter of the judgment; that is, as the power is applied in cases at common law or in cases not at common law. On the exercise of the powers of the national Government, in reference to the first of these classes of cases, there are special limitations in the Constitution and the Amendments. Subject to these, the exercise of the judicial power of the United States by the Circuit and District courts, is regulated by adopting, under the legislation of Congress, the English common law of remedy as it may have

<sup>1</sup> See *post*, in Ch. XXIX. Compare *ante*, § 822.

<sup>2</sup> 14 Wendell, 527, and *ante* p. 451, note.

<sup>3</sup> See *post*, § 832.

prevailed at the date of such legislation in the States in which those courts may exercise jurisdiction.<sup>1</sup> In causes of equity, and of admiralty and maritime jurisdiction, the forms and modes of proceeding adopted under the same authority are according to the course of the civil law; that is to say, "the principles and usages which belong to courts of equity and courts of admiralty respectively as contradistinguished from courts of common law," are adopted as a law of remedy,<sup>2</sup> subject to various modifications expressed in the laws of Congress establishing those courts, and to the powers conferred on them to regulate their own proceedings.<sup>3</sup>

The practice of the Supreme Court, in the exercise of its very limited original jurisdiction, is directed by rules which it has full power to establish for itself, subject only to a few very general provisions in the judiciary acts.<sup>4</sup> All these courts are empowered "to issue writs of scire facias, habeas corpus, and all other writs not specially provided by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the principles and usages of law."<sup>5</sup>

If the subject-matters of the rules contained in these provisions in the fourth Article constitute cases at common law, there are certain constitutional restrictions which apply to the exercise of the judicial function by the national authority. If they do not constitute cases of that denomination, there are other restrictions which apply generally to the exercise of any authority conferred by the Constitution of the United States, which therefore must modify the judicial action of the national courts in these cases.

<sup>1</sup> Acts Sep. 24, 1789, § 34, I. Stat. U. S. 73; Mar. 2, 1793, § 7, ib. 335; Sep. 29, 1789, § 2, ib. 93; May 19, 1828, § 1. IV. Stat. U. S. 278. *Wayman v. Southard*, 10 Wheaton, 1; *Robinson v. Campbell*, 3 ib. 212, 222; 1 Peters' C. C. R. 1. On the exceptional position of Louisiana, in which the remedial forms of the civil law had exclusively prevailed, see Act May 26, 1824, IV. St. U. S. 62; 3 Peters', 433, 446.

<sup>2</sup> Act May 8, 1792, § 2, I. St. U. S. 276; the authorities last cited; *Manro v. Almeida*, 10 Wheaton, 473.

<sup>3</sup> The same authorities; Act Sep. 29, 1789, § 17; Mar. 2, 1793, § 1; I. St. U. S. 335.

<sup>4</sup> Acts of Sep. 24 and 29, 1789. See Conckling's Treatise, 3d ed. 300.

<sup>5</sup> Act of Sep. 24, 1789, § 14. It seems that, in matters of habeas corpus in the United States courts, the law followed is the common-law practice of England, as it stood at the time of the adoption of the Constitution. *Ex parte Watkins*, 3 Peters, 201; *Ex parte Randolph*, 2 Brock. C. C. 476.



The judicial and juristical opinions on the force of such constitutional restrictions to limit the action of the national Government in carrying these provisions into effect, have been expressed only in cases arising under the Acts of Congress directed to that end. These opinions will be presented in the succeeding chapters. In no instance, probably, has a demand for a fugitive from justice or a claim for a fugitive from labor been brought before a judicial tribunal, except in proceedings instituted under the Acts of Congress or some State law.

§ 828. If the judicial power of the several States may be concurrently exercised in applying the law contained in these provisions, it would seem that it must be applied consistently with whatever guarantees private persons may claim under law proceeding from the same source; i. e., guarantees contained in the national Constitution.<sup>1</sup> But, in other respects, the exercise of State judicial power must depend altogether upon the State constitution. There is nothing in the Constitution of the United States to determine the exercise of State judicial power, except the general provision in the sixth Article, that "This Constitution and the laws of the United States which shall be made in pursuance thereof, and all treaties made or which shall be made under the authority of the United States, shall be the supreme law of the land, and the judges in every State shall be bound thereby, anything in the constitution or laws of any State to the contrary notwithstanding."

The delivery of fugitives from justice and from service was evidently, originally, within the juridical power of the several States. It would appear, therefore, that cases arising under these clauses, according to the fourth construction, would fall within the concurrent judicial power of the States, and that they will be within the cognizance of any State court having ordinary or common-law jurisdiction,<sup>2</sup> and by State legislation may be placed within the cognizance of courts of

<sup>1</sup> But if a law in reference to the same subject-matter may proceed from the "reserved powers" of the State, in the exercise of concurrent juridical or legislative power, such law could be applied by the judicial power of the State, subject only to guarantees in the State constitution or bill of rights.

<sup>2</sup> *Ante*, § 456.

special or limited jurisdiction. Since the law to be applied in the supposed case is national law in its authority, it is necessary to admit that the application of it may by Congress be confined to the national judiciary, and that, while it is concurrently administered, the supreme national judicature will have the same duties and powers in reference to its application by State courts which it has in the application of any other rule found in the Constitution and operating as private law.<sup>2</sup>

§ 829. On general or common-law principles it would seem that State courts of ordinary or general jurisdiction have power to frame and issue writs suited to bring up the alleged fugitive from justice or from labor to answer the demand or claim.<sup>3</sup> The writ of habeas corpus, as ordinarily spoken of, may be called "that legal process which is employed for the summary vindication of the right of personal liberty when illegally restrained."<sup>4</sup> As such it would be unsuitable for the purposes of a demandant or claimant under either of the constitutional provisions, since there would not, in either case, be any third party supposed to be unjustly detaining the fugitive, against whom it could be directed. It is indeed the habeas corpus *cum causa, ad subjiciendum et recipiendum*, the writ of right, the great English guarantee of personal freedom, which, in the Constitution and in bills of rights, is particularly referred to as the writ of habeas corpus. But the term is generic for a variety of writs known to English law.<sup>5</sup> Other writs of the same class, as *habeas corpus ad respondendum, ad faciendum et recipiendum, ad satisfaciendum*, might be employed in these instances.<sup>6</sup> Or perhaps the writ *de nativo habendo*, with

<sup>2</sup> *Ante*, § 459. *Jack v. Martin*, 14 Wend. 527, Walworth, Ch.;—"The Supreme Court of the United States is possessed of ample powers to correct any erroneous decision which might be made in the State courts against the right of the master."

<sup>3</sup> It is provided in R. S. of New York, P. III., c. 3, t. 2, art. 1, § 1, as before in 2 R. L. of 1813, p. 147, that courts of record shall have power "to devise and make such new writs and forms of proceeding as may be necessary to carry into effect the powers and jurisdiction possessed by them."

<sup>4</sup> Rollin C. Hurd's Habeas Corpus, 143.

<sup>5</sup> *Ib.* 144.

<sup>6</sup> The law of New York, of 1828 (*ante*, p. 57), provided for issuing in these cases a writ of *habeas corpus*, without other descriptive words. According to the minutes of a trial of an owner for attempting forcibly to abduct his slave from England, in King's Bench, Feb. 20, 1771, which are given in Hoare's *Life of Granville Sharp*, 4to. p. 59, Lord Mansfield said:—"I have granted several



the adverse writ *de proprietate probanda*, might be revived for the purpose of enforcing the claim for a fugitive from labor.<sup>1</sup>

If the master may seize the slave for the purpose of removal, as decided in Prigg's case, then, as a means of trying the question of ownership, a *habeas corpus cum causa* or a writ of personal replevin may be sued out on behalf of the person seized. But, according to the view of the provision which is herein taken, the right to seize the fugitive is given only, if at all, to enable the claimant to bring him before a court which

writs of habeas corpus upon affidavits of masters for their negroes. Two or three, I believe, on affidavits of masters deducing sale and property of their negroes, upon being prest, I have granted habeas corpus to deliver them to their masters; but whether they have this kind of property or not in England, has never been solemnly determined."

<sup>1</sup> For the nature of the proceeding on these writs, see Fitzherbert's Nat. Brev. fo. 77, 87; Co. Litt. fo. 124. Mr. Sumner, in a speech in the Senate of the U. S. on his motion to repeal the fugitive-slave bill, Aug. 26, 1852, summed up part of his argument as follows:—

"Briefly, the States are prohibited from any 'law or regulation' by which the fugitive may be discharged, and, on the establishment of the claim to his service, he is to be delivered up. But the mode by which the claim is to be determined is not specified. All this is obviously within the control of each State. It may be done by virtue of express legislation, in which event any legislature, justly careful of personal liberty, would surround the fugitive with every shield of the law and constitution.

"But such legislation may not be necessary. The whole proceeding, without any express legislation, may be left to the ancient and authentic forms of the common law, familiar to the framers of the Constitution, and ample for the occasion. If the fugitive be seized without process, he will be entitled at once to his writ *de homine replegiando*, while the master, resorting to process, may find his remedy in the writ *de nativo habendo*—each writ requiring trial by jury.

"If, from ignorance or lack of employment, these processes have slumbered in our country, still they belong to the great arsenal of the common law, and continue, like other ancient writs, *tantum gladium in vagina*, ready to be employed at the first necessity. They belong to the safeguards of the citizen. But, in any event, and in either alternative, the proceedings would be by 'suit at common law,' with trial by jury, and it would be the solemn duty of the court, according to all the forms and proper delays of the common law, to try the case on the evidence; strictly to apply all the protecting rules of evidence, and especially to require stringent proof, by competent witnesses under cross-examination, that the person claimed was held to service; that his service was due to the claimant; that he had escaped from the State where such service was due; and also proof of the laws of the State under which he was held. Still further, to the courts of each State must belong the determination of the question, to what classes of persons, according to just rules of interpretation, the phrase 'persons held to service or labor' is strictly applicable.

"Such is this much-debated provision. The slave States, at the formation of the Constitution, did not propose, as in the cases of naturalization and bankruptcy, to empower the national government to establish a uniform rule for the rendition of fugitives from labor, throughout the United States; they did not ask the national government to charge itself in any way with this service; they did not venture to offend the country, and particularly the Northern States, by any such assertion of a hateful right. They were content, under the sanctions of compact, to leave it to the public sentiment of the States. There, I insist, it shall remain."

may decide on the claim. It has been seen that there are cases in which an arrest or seizure by the claimant, for the purpose of bringing the alleged fugitive before a court or magistrate for the purpose of making a claim and procuring a certificate under the Act of Congress of 1793, has been justified: the right being supposed to be given by the Constitution itself, though not provided for in the statute.<sup>1</sup>

§ 830. So far as the judicial power of the United States should be applicable in cases thus arising under these provisions, its action would have equal extent throughout the United States, and would be adequate to the international extradition and return of the fugitive in any supposed case. But the concurrent judicial power of the State in which a fugitive might be found, could not, even in administering the same national law, have force or extent beyond the several jurisdiction of that State. At least, it would depend upon the "effect" given to "acts, records, and judicial proceedings" of one State in every other State, under the first section of the fourth Article, whether the judicial tribunals of other States could or could not inquire into a custody claimed under the exercise of the State judicial power of some other State, in one of these cases. Still the international extradition or delivery and return of a fugitive to the State from which he had escaped might be fully completed under the judicial power of the State, when the States, as between which the extradition or delivery was required, should happen to be adjoining States.

§ 831. But the courts vested with the judicial power of the United States constitute a department of the Government, and their judicial officers are officers of that Government. It would seem that if any laws are necessary and proper for carrying into effect the powers of those courts in reference to cases arising under these clauses, that Congress has a power of legislation expressly given, by the last clause in the eighth section of the first Article, which gives power "to make all laws which shall be necessary and proper for carrying into execution \* \* all other powers vested by this Constitution in the

<sup>1</sup> *Hill v. Low*, 4 Wash. C. C. 327, *ante*, p. 439; *Commonw. v. Griffith*, 2 Pick. 11, *ante*, p. 440; *Johnson v. Tompkins*, 1 Bald. C. C. 571, *ante*, p. 443.



Government of the United States, or in any department or officer thereof."

§ 832. There is probably no authority, strictly judicial,<sup>1</sup> which distinctly refers the legislation of Congress to the power to carry into execution the powers of the judicial department

<sup>1</sup> The language of Chancellor Walworth in *Jack v. Martin*, 14 Wen., 526 (*ante*, p. 451, note), approaches very nearly to a justification of the power of Congress on this ground. Though he thought that the law of 1793 was "certainly not a law to carry into effect the judicial power of the United States," he intimated that, if "the judicial power of declaring and enforcing the rights secured by the Constitution" could not be otherwise made effectual in securing the rights given by this clause, Congress might legislate for that purpose. Mr. O'Connor in that case maintained the power of Congress on this ground; 14 Wendell, 518:—"The power [i. e. of legislation] claimed is expressly granted. The Constitution declares that slaves escaping from service shall be delivered up 'on claim' of the party to whom such service may be due. If the words 'on claim' mean a mere informal demand *in pais*, then there is an end of the question, for we act under the Constitution itself, and all legislation on the subject by Congress or the States is repugnant to our rights secured by the Constitution, and therefore void; but if, as every lawyer must admit, they contemplate, as a prerequisite to the right of removal, a judicial proceeding by which the claim shall be tried and adjudged to be valid, a subject is presented which falls within the limits of judicial power. Art. 3, § 2, declares that the judicial power of the United States extends to all cases in law and equity arising under the Constitution. This clause is clearly a legal claim, and its assertion created a case in law arising under the Constitution. By Art. 3, § 1, the judicial power of the United States is vested in the Supreme Court and such inferior courts as Congress may ordain and establish; and in the general enumeration of powers, Art. 1, § 8, Congress is not only empowered, sub. 9, to constitute tribunals inferior to the Supreme Court, but also, sub. 17, to make all laws which shall be necessary and proper for carrying into execution the powers vested in any department of the general Government. In creating each of the officers named in the Act, a court, to pass upon and declare the validity of the claim to service which should warrant a removal, and in defining the mode of proceeding to adjudicate upon the claim, Congress acted in strict accordance with the authority granted to constitute tribunals in which should be exercised the judicial power of the Union, and to pass such laws as should be necessary to enable these tribunals to perform their functions."

Mr. Meredith, counsel, in support of the law of 1793, in *Prigg's case*, in the opening of his argument, held that legislation was necessary before the provision could have an effect on the persons intended. (16 Peters, 560, 561.) But, on p. 567, he observes:—"But if the question can still be considered an open one, there is no difficulty in showing that the power of legislation in reference to this subject is granted by the Constitution to Congress. It would be strange if it were not so; strange if, upon a subject of such intense and general interest, to which the mind of the convention had been so directly called, they had left their work unfinished—their purpose unaccomplished. It has been said, however, and may be said again, that the legislative power of the federal Government is a limited one; that the Constitution enumerates the cases in which it may be exercised, but that this is not among the number. That, besides these enumerated cases, a general power is given to Congress to pass all laws necessary and proper to carry into execution all powers granted by the Constitution to the Government, or any of its departments or officers. But that there is no power so granted in reference to this provision,—is this so? The Constitution declares that slaves escaping from service shall be delivered up, on claim, to the person to whom such service is due. What is the meaning of these words, 'on claim'? They look to a proceeding of a judicial character; to an assertion of the right of property to be

in cases coming within the meaning of the provision by taking the fourth construction. But, as will be seen from the last note, that theory has been advanced in two of the leading cases by counsel maintaining the actual legislation of Congress in respect to fugitives from labor.

In Booth's case, 3 Wisconsin, 45, 46, Judge Smith very summarily rejected this theory for the legislation of Congress,<sup>1</sup> which he there ascribed to the Supreme Court in Prigg's case.

§ 833. The legislation of Congress may be spoken of as being necessary and proper with reference to the end to be attained, that is, in being directed towards a necessary and proper object; and here the supposed object of legislation is the execution of the provisions of the fourth Article, and the question of the legislation of Congress in reference to the subject-matter is reduced to this, whether any law is necessary and proper for the execution of that judicial power of the United States in reference to these cases.

made before a tribunal competent to judge and decide; and to execute that decision by a delivery of the property if the claim is established. Is not this, then, a part of the judicial power which extends to all cases at law and in equity arising under the Constitution, laws, and treaties of the United States? Is not every such claim a legal claim? and, when asserted, is it not a case at law arising under the Constitution? If, then, the judicial power extends to cases falling within this provision of the Constitution, Congress had an unquestionable right to vest it. It was a duty to vest it, because this court has decided that the language of the Constitution in regard to the impartment of the judicial power is imperative upon Congress. *Martin v. Hunter, 1 Wheat. R. 304, 316.*"

The same theory for the legislation of Congress is relied upon in Mr. Conway Robinson's essay already noticed. See 23 Am. Jurist, 351.

The case within the judicial power, according to the theory here proposed, must not be confounded with that which arises under the third construction, which Judge Story made the basis of legislation, and which has been noticed *ante*, § 790.

<sup>1</sup> *Ante*, p. 514, note. Judge Smith argues that on this theory Congress might assume legislative power over any topics of law which the national courts examine when they determine the rights of parties within their jurisdiction. This is a groundless objection. It is the judicial power only which is regulated by the Act of Congress. Congress cannot change the law which is to be applied by the judicial power. Judge Smith also mistakes in confounding the doctrine with that of a common-law jurisdiction for the national courts, and the power to pass the Alien and Sedition laws,—a matter entirely distinct.

In 9 Ohio, 244, Judge Sutliff, arguing against his own conception of the received theory (*ante*, p. 527), denies that a case can arise, if the provision acts on the States as its subjects. But he also asserts that there can be no case within the judicial power of the United States, unless it has arisen under some Act of Congress. He thus denies altogether the operation of the Constitution as private law, and his argument would apply against the theory herein accepted, as well as against that to which he there objects.



The extent of the legislative power granted to Congress, by these terms "necessary and proper," is obviously of great importance in reference to many other subjects of legislation besides the one under consideration; and, though it has been discussed by the ablest American jurists in many important cases, it must continue to be, in new instances of legislation, a much-debated question of the national municipal public law of the United States. It has received full consideration from the principal writers upon the Constitution.<sup>1</sup>

If the view which has herein before been taken of the nature of this Article of the Constitution, and of the powers of the judiciary under it, is correct; if the demand and delivery of a fugitive from justice, or the claim and delivery of a fugitive from labor, may be a subject of judicial cognizance, even without authority derived from legislation; yet,—since it is a matter of obscurity in what manner the international arrest and delivery of criminals could have been subjected to judicial cognizance before the Revolution, and since the right of an alien owner (foreign or domestic alien) was not uniformly enforced in the colonies by proceedings of common-law origin, and since, also, if the United States courts should, under the provisions of the judiciary Act,<sup>2</sup> in each State follow the local common-law practice, that practice might differ greatly in different States, as their common law on this topic of jurisprudence may have differed, and thus an inequality would arise between the different States, or their respective inhabitants, in the means of sustaining an international right, which is supposed to be equally guaranteed to those who are reciprocally entitled to it,—there is evidently some ground for holding that the judicial execution of this provision is an object of legislation as necessary and proper for the action of Congress as can possibly be conceived of under the Constitution. Still more evidently is this so if the cases under these provisions (viewed as law acting on private persons) are not cases at common law, and therefore not subject to those constitutional adaptations of the judicial power of the United States which apply to that class of cases.

<sup>1</sup> 1 Kent's Comm. 237-269. Story's Comm. Ch. 24.  
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<sup>2</sup> *Ante*, § 822.

§ 834. The application of judicial power in the cases arising under these provisions, on the theory above stated, must result in some judgment or decree to be carried into execution. A difficulty may suggest itself as to the nature of the judgment which could be rendered under either of these provisions regarded as the law to be applied.

In one provision it is expressly stated that the fugitive from justice is to be "delivered up, *to be removed to the State* having jurisdiction of the crime." In this instance it would seem competent to the judicial power enforcing the provision as law to decree or authorize such a removal, and thereby make the custody of such fugitive valid in any other State through which he might be carried for that purpose.

But in the other provision it is merely stated that the fugitive from labor shall be "delivered up on claim," and it would appear that the judgment in the supposed case could not go farther than to award such a delivery to the claimant in the State in which the fugitive might be found, and that, if its legislation is based upon the purpose of carrying into effect the judicial power, Congress could not provide for anything beyond such a delivery. It does not appear that under a judgment rendered in such case the claimant could be required to carry the fugitive back to the State in which he had been held to service; for such a return is not mentioned in the provision itself. The judgment could not, of course, authorize the claimant to hold the fugitive at his discretion in the State in which such delivery had been made. But it would seem to be necessarily implied that it would sanction any custody or holding necessary to remove the fugitive from the limits of the State. The question might be raised, whether any judgment in such case could sanction the custody or holding in other States, through which it might be necessary for the parties to pass in returning to the State by whose law the fugitive had been held to service.

But as the custody which follows on the judgment in the case supposed must necessarily be continued beyond the instant when the judgment is pronounced, the delivery contemplated must be regarded as a continuing act. As it is made under a law of national extent, it would seem that its continu-



ance should be determined by the duration of the circumstances which called for such a delivery, and that the legal custody under a judgment in the case supposed may continue as long as the fugitive is in any State wherein his debt of service or labor is not recognized by the local law of the forum.

But if the judgment in the cases supposed cannot thus operate beyond the State in which the fugitive was actually found, the inconvenience could not be remedied by any legislation of Congress; if that legislation is founded on the above-described theory of carrying into effect the judicial power.

§ 835. If the delivery in the case of a fugitive of either class were made under the local law of a State, proposing to fulfill its obligations under the first construction of these provisions, it is evident that it could do so only when the State from which the fugitives escaped is not separated by intervening States from that in which they should be found. The obvious difficulty, in other cases, under this method of carrying these provisions into effect, has been urged as a proof of the necessity and propriety of legislation by Congress.<sup>1</sup> But it is plain that this argument bears, in reality, on the question of the construction of the provisions, and against the first construction. It is, at the best, only the argument *ab inconvenienti*. It applies with greater force to the construction of one provision than of the other; since, though a return to the State from which the fugitive from justice escaped is required by the first, a bare delivery to the claimant owner in the State where the fugitive from service is found may be enough to satisfy the requirement of the other. There is not, in the supposed inconvenience, any argument in favor of the second or of any adaptation of the third construction, and therefore no argument in support of a power in Congress. Or, if this inability on the part of the States, in some instances, to effectuate a return to the State from which the fugitive escaped, can only

<sup>1</sup> Jack v. Martin, 12 Wend. 321. Nelson, Ch. J.:—"We may add also that, as the power of legislation belonging to the States is in no instance derived from the Constitution of the United States, but flows from their own sovereign authority, any law they might pass on the subject would not be binding beyond their jurisdiction, and any precept or authority given in pursuance of it would carry none to the owner to remove the fugitive beyond it; the authority of each State through which it was necessary to pass would become indispensable." And in Prigg's case, see language of Thompson, J., 16 Peters, 634; Wayne, J., ib. 640.

be obviated by bringing the entire subject within the powers of the national Government, it may be done as well by assuming the fourth construction.

§ 836. An argument against power in Congress to legislate for the purpose of giving effect to any of the provisions of the second section of the fourth Article has been drawn from the special grant of power to legislate for giving effect to the clause in the first section declaring that "full faith and credit shall be given in each State to the acts, records, and judicial proceedings of every other State." This objection was principally insisted on by Judge Hornblower in the Opinion written in *Helmsley's case*.<sup>1</sup>

This argument is advanced as in conformity with the maxim, *Expressio unius est exclusio alterius*, and assumes that there is no distinction discernible between the rule expressed in the first section and those given in the second.

But whether there be no distinction, may depend upon the question, whether the several provisions in the two sections should all receive the same one of the four constructions already indicated as possible. But if they are all to receive the same, the force of the argument may differ according to the construction adopted.

It has not herein been thought necessary to consider the question of the construction of the first clause of the first section of the fourth Article.<sup>2</sup> But—assuming here that the provisions of the second section are, according to the argument already stated, to receive the fourth construction, and that the clause in the first section should receive the same construction, by which it operates as private law, creating rights and obligations of private persons,—it is to be noticed that, while the rights created by the provisions of the second section are substantive or primary rights, which may be the foundation of cases to which the judicial power would extend, the rights created by the above-mentioned clause of the first section, being rights in respect to evidence, are only secondary, reme-

<sup>1</sup> *Ante*, pp. 453, 454, note. See also the statement of the argument by Mr. Wolcott, counsel, in *Bushnell's and Langston's case*, 9 Ohio, 119, and by Brinkhoff, J., *ib.*, 225.

<sup>2</sup> *Ante*, § 625.



dial, or adjective rights, which could not, alone, be the basis of such *cases*.<sup>1</sup> Hence there could be no foundation for the legislation of Congress in reference to the enforcement of the rights and obligations arising under this clause, as, according to the view already presented, there is reference to the enforcement of the rights and obligations arising under the provisions of the second section, under the fourth construction. There is, therefore, in harmony with these views, a reason for granting the power in the one case which does not exist in the other.

<sup>1</sup> *Ante*, § 618.

## CHAPTER XXVIII.

DOMESTIC INTERNATIONAL LAW OF THE UNITED STATES. THE SUBJECT CONTINUED. OF THE LEGISLATION OF CONGRESS IN RESPECT TO FUGITIVES FROM JUSTICE AND FROM LABOR. GENERAL NATURE OF THE INQUIRY. OF THE QUESTION WHETHER THE GOVERNORS OF STATES MAY CONSTITUTIONALLY DELIVER UP FUGITIVES FROM JUSTICE, AS PROVIDED BY THE ACT OF 1793.

§ 837. Whatever may be the true doctrine as to the power of Congress to legislate for the purpose of carrying into effect these provisions of the Constitution, the power has been exercised in the Acts of Feb. 12, 1793, and of Sept. 18, 1850, which are given in the note below.<sup>1</sup>

<sup>1</sup> 1 St. U. S. 302, 2 B. & D. 331. *An Act respecting fugitives from justice and persons escaping from the service of their masters.*

SEC. 1. *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That whenever the executive authority of any State in the Union, or of either of the territories, northwest or south of the river Ohio, shall demand any person as a fugitive from justice, of the executive authority of any such State or territory to which such person shall have fled, and shall, moreover, produce the copy of an indictment found, or an affidavit made before a magistrate of any State or territory as aforesaid, charging the person so demanded with having committed treason, felony, or other crime, certified as authentic by the governor or chief magistrate of the State or territory from whence the person so charged fled, it shall be the duty of the executive authority of the State or territory to which such person shall have fled, to cause him or her to be arrested and secured, and notice of the arrest to be given to the executive authority making such demand, or to the agent of such authority appointed to receive the fugitive, and to cause the fugitive to be delivered to such agent when he shall appear: But if no such agent shall appear within six months from the time of the arrest, the prisoner may be discharged. And all costs or expenses incurred in the apprehending, securing, and transmitting such fugitive to the State or territory making such demand, shall be paid by such State or territory.

SEC. 2. *And be it further enacted,* That any agent appointed as aforesaid, who shall receive the fugitive into his custody, shall be empowered to transport him or her to the State or territory from which he or she shall have fled. And if any person or persons shall, by force, set at liberty or rescue the fugitive from such agent while transporting as aforesaid, the person or persons so offending shall, on conviction, be fined not exceeding five hundred dollars, and be imprisoned not exceeding one year.

SEC. 3. *And be it also enacted,* That when a person held to labor in any of the United States, or in either of the territories on the northwest or south of the river Ohio, under the laws thereof, shall escape into any other of the said States or territory, the person to whom such labor or service may be due, his agent or attor-



Assuming that Congress has power to legislate for this purpose, or, that such legislation is "necessary and proper" in respect to its object, still, the terms necessary and proper in the eighth section of the first Article have significance not only in reference to the object of legislation, but also in re-

ney, is hereby empowered to seize or arrest such fugitive from labor, and to take him or her before any judge of the Circuit or District Courts of the United States, residing or being within the State, or before any magistrate of a county, city, or town corporate, wherein such seizure or arrest shall be made, and upon proof to the satisfaction of such judge or magistrate, either by oral testimony or affidavit taken before, and certified by, a magistrate of any such State or territory, that the person so seized or arrested, doth, under the laws of the State or territory from which he or she fled, owe services or labor to the person claiming him or her, it shall be the duty of such judge or magistrate to give a certificate thereof to such claimant, his agent or attorney, which shall be sufficient warrant for removing the said fugitive from labor to the State or territory from which he or she fled.

SEC. 4. *And be it further enacted*, That any person who shall knowingly and willingly obstruct or hinder such claimant, his agent or attorney, in so seizing or arresting such fugitive from labor, or shall rescue such fugitive from such claimant, his agent or attorney, when so arrested pursuant to the authority herein given or declared; or shall harbor or conceal such person after notice that he or she was a fugitive from labor, as aforesaid, shall, for either of the said offences, forfeit and pay the sum of five hundred dollars. Which penalty may be recovered by and for the benefit of such claimant, by action of debt, in any court proper to try the same; saving, moreover, to the person claiming such labor or service, his right of action for or on account of the said injuries or either of them.

Approved February 12, 1793.

IX. St. U. S. 462. *An Act to amend, and supplementary to, the Act entitled "An Act respecting Fugitives from Justice, and Persons escaping from the Service of their Masters," approved February twelfth, one thousand seven hundred and ninety-three.*

SEC. 1. *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That the persons who have been, or may hereafter be, appointed commissioners, in virtue of any Act of Congress, by the Circuit Courts of the United States, and who, in consequence of such appointment, are authorized to exercise the powers that any justice of the peace, or other magistrate of any of the United States, may exercise in respect to offenders for any crime or offence against the United States, by arresting, imprisoning, or bailing the same under and by virtue of the thirty-third section of the act of the twenty-fourth of September, seventeen hundred and eighty-nine, entitled "An Act to establish the judicial courts of the United States," shall be, and are hereby, authorized and required to exercise and discharge all the powers and duties conferred by this act.

SEC. 2. *And be it further enacted*, That the Superior Court of each organized Territory of the United States shall have the same power to appoint commissioners to take acknowledgments of bail and affidavits, and to take depositions of witnesses in civil causes, which is now possessed by the Circuit Court of the United States; and all commissioners who shall hereafter be appointed for such purposes by the Superior Court of any organized Territory of the United States, shall possess all the powers, and exercise all the duties, conferred by law upon the commissioners appointed by the Circuit Courts of the United States for similar purposes, and shall moreover exercise and discharge all the powers and duties conferred by this act.

SEC. 3. *And be it further enacted*, That the Circuit Courts of the United States, and the Superior Courts of each organized Territory of the United States, shall

spect to the means which it may provide for that object, and their consistency with the principles of that national municipal law, public and private, which is either expressed in or recognized by the Constitution.

No part of the Act of 12th February, 1793, which relates

from time to time enlarge the number of commissioners, with a view to afford reasonable facilities to reclaim fugitives from labor, and to the prompt discharge of the duties imposed by this act.

SEC. 4. *And be it further enacted*, That the commissioners above named shall have concurrent jurisdiction with the judges of the Circuit and District Courts of the United States, in their respective circuits and districts within the several States, and the judges of the Superior Courts of the Territories, severally and collectively, in term-time and vacation; and shall grant certificates to such claimants, upon satisfactory proof being made, with authority to take and remove such fugitives from service or labor, under the restrictions herein contained, to the State or Territory from which such persons may have escaped or fled.

SEC. 5. *And be it further enacted*, That it shall be the duty of all marshals and deputy marshals to obey and execute all warrants and precepts issued under the provisions of this act, when to them directed; and should any marshal or deputy marshal refuse to receive such warrant, or other process, when tendered, or to use all proper means diligently to execute the same, he shall, on conviction thereof, be fined in the sum of one thousand dollars, to the use of such claimant, on the motion of such claimant, by the Circuit or District Court for the district of such marshal; and after arrest of such fugitive, by such marshal or his deputy, or whilst at any time in his custody, under the provisions of this act, should such fugitive escape, whether with or without the assent of such marshal or his deputy, such marshal shall be liable, on his official bond, to be prosecuted for the benefit of such claimant, for the full value of the service or labor of said fugitive in the State, Territory, or District whence he escaped; and the better to enable the said commissioners, when thus appointed, to execute their duties faithfully and efficiently, in conformity with the requirements of the Constitution of the United States and of this act, they are hereby authorized and empowered, within their counties respectively, to appoint, in writing under their hands, any one or more suitable persons, from time to time, to execute all such warrants and other process as may be issued by them in the lawful performance of their respective duties; with authority to such commissioners, or the persons to be appointed by them, to execute process as aforesaid, to summon and call to their aid the bystanders, or *posse comitatus* of the proper county, when necessary to insure a faithful observance of the clause of the Constitution referred to, in conformity with the provisions of this act; and all good citizens are hereby commanded to aid and assist in the prompt and efficient execution of this law, whenever their services may be required, as aforesaid, for that purpose; and said warrants shall run, and be executed by said officers, anywhere in the State within which they are issued.

SEC. 6. *And be it further enacted*, That when a person held to service or labor in any State or Territory of the United States, has heretofore or shall hereafter escape into another State or Territory of the United States, the person or persons to whom such service or labor may be due, or his, her, or their agent or attorney, duly authorized by power of attorney, in writing, acknowledged and certified under the seal of some legal officer or court of the State or Territory in which the same may be executed, may pursue and reclaim such fugitive person, either by procuring a warrant from some one of the courts, judges, or commissioners aforesaid, of the proper circuit, district, or county, for the apprehension of such fugitive from service or labor, or by seizing and arresting such fugitive, where the same can be done without process, and by taking, or causing such person to be taken,



to the delivery both of fugitives from justice and of fugitives from labor, is repealed by the law of 18th September, 1850; and the latter Act relates only to the delivery of the latter description of persons. For this reason, and from the many parallelisms which have been judicially distinguished in the

forthwith before such court, judge, or commissioner, whose duty it shall be, to hear and determine the case of such claimant in a summary manner; and upon satisfactory proof being made, by deposition or affidavit, in writing, to be taken, and certified by such court, judge, or commissioner, or by other satisfactory testimony, duly taken and certified by some court, magistrate, justice of the peace, or other legal officer authorized to administer an oath and take depositions under the laws of the State or Territory from which such person owing service or labor may have escaped, with a certificate of such magistracy or other authority, as aforesaid, with the seal of the proper court or officer thereto attached, which seal shall be sufficient to establish the competency of the proof, and with proof, also by affidavit, of the identity of the person whose service or labor is claimed to be due as aforesaid, that the person so arrested does in fact owe service or labor to the person or persons claiming him or her, in the State or Territory from which such fugitive may have escaped as aforesaid, and that said person escaped, to make out and deliver to such claimant, his or her agent or attorney, a certificate setting forth the substantial facts as to the service or labor due from such fugitive to the claimant, and of his or her escape from the State or Territory in which such service or labor was due, to the State or Territory in which he or she was arrested, with authority to such claimant, or his or her agent, or attorney, to use such reasonable force and restraint as may be necessary, under the circumstances of the case, to take and remove such fugitive person back to the State or Territory whence he or she may have escaped as aforesaid. In no trial or hearing under this Act shall the testimony of such alleged fugitive be admitted in evidence; and the certificates in this and the first (fourth) section mentioned, shall be conclusive of the right of the person or persons in whose favor granted, to remove such fugitive to the State or Territory from which he escaped, and shall prevent all molestation of such person or persons by any process issued by any court, judge, magistrate, or other person whomsoever.

SEC. 7. *And be it further enacted*, That any person who shall knowingly and willingly obstruct, hinder, or prevent such claimant, his agent or attorney, or any person or persons lawfully assisting him, her, or them, from arresting such a fugitive from service or labor, either with or without process as aforesaid, or shall rescue or attempt to rescue such fugitive from service or labor, from the custody of such claimant, his, or her agent, or attorney, or other person or persons lawfully assisting as aforesaid, when so arrested, pursuant to the authority herein given, and declared; or shall aid, abet, or assist such person so owing service or labor as aforesaid, directly or indirectly, to escape from such claimant, his agent or attorney, or other person or persons legally authorized as aforesaid; or shall harbor or conceal such fugitive, so as to prevent the discovery and arrest of such person, after notice or knowledge of the fact that such person was a fugitive from service or labor as aforesaid, shall, for either of said offences, be subject to a fine not exceeding one thousand dollars, and imprisonment not exceeding six months, by indictment and conviction before the District Court of the United States, for the district in which such offence may have been committed, or before the proper court of criminal jurisdiction, if committed within any one of the organized Territories of the United States, and shall moreover forfeit and pay, by way of civil damages to the party injured by such illegal conduct, the sum of one thousand dollars for each fugitive so lost as aforesaid, to be recovered by action of debt, in any of the District or Territorial Courts aforesaid, within whose jurisdiction the said offence may have been committed.

SEC. 8. *And be it further enacted*, That the marshals, their deputies, and the

legislation of Congress on these subjects, as also in the two constitutional provisions upon which they are founded, they may, to a certain extent, be considered together, in reference to the necessity and propriety and the general constitutionality of the means provided in them for their respective objects.

clerks of the said District and Territorial Courts, shall be paid for their services the like fees as may be allowed to them for similar services in other cases; and where such services are rendered exclusively in the arrest, custody, and delivery of the fugitive to the claimant, his or her agent or attorney, or where such supposed fugitive may be discharged out of custody for the want of sufficient proof as aforesaid, then such fees are to be paid in the whole by such claimant, his agent or attorney; and in all cases where the proceedings are before a commissioner, he shall be entitled to a fee of ten dollars in full for his services in each case, upon the delivery of the said certificate to the claimant, his or her agent or attorney; or a fee of five dollars in cases where the proof shall not, in the opinion of such commissioner, warrant such certificate and delivery, inclusive of all services incident to such arrest and examination, to be paid, in either case, by the claimant, his or her agent, or attorney. The person or persons authorized to execute the process to be issued by such commissioner for the arrest and detention of fugitives from service or labor as aforesaid, shall also be entitled to a fee of five dollars each for each person he or they may arrest and take before any such commissioner as aforesaid, at the instance and request of such claimant, with such other fees as may be deemed reasonable by such commissioner for such other additional services as may be necessarily performed by him or them; such as attending at the examination, keeping the fugitive in custody, and providing him with food and lodging during his detention and until the final determination of such commissioner; and, in general, for performing such other duties as may be required by such claimant, his or her attorney, or agent, or commissioner in the premises, such fees to be made up in conformity with the fees usually charged by the officers of the courts of justice within the proper district or county, as near as may be practicable, and paid by such claimants, their agents or attorneys, whether such supposed fugitives from service or labor be ordered to be delivered to such claimants by the final determination of such commissioners or not.

SEC. 9. *And be it further enacted*, That, upon affidavit made by the claimant of such fugitive, his agent or attorney, after such certificate has been issued, that he has reason to apprehend that such fugitive will be rescued by force from him or their possession before he can be taken beyond the limits of the State in which the arrest is made, it shall be the duty of the officer making the arrest to retain such fugitive in his custody, and to remove him to the State whence he fled, and there to deliver him to said claimant, his agent or attorney. And to this end, the officer aforesaid is hereby authorized and required to employ so many persons as he may deem necessary to overcome such force, and to retain them in his service so long as circumstances may require. The said officer and his assistants, while so employed, to receive the same compensation, and to be allowed the same expenses, as are now allowed by law for transportation of criminals, to be certified by the judge of the district within which the arrest is made, and paid out of the treasury of the United States.

SEC. 10. *And be it further enacted*, That when any person held to service or labor in any State or Territory, or in the District of Columbia, shall escape therefrom, the party to whom such service or labor shall be due, his, her, or their agent or attorney, may apply to any court of record therein, or judge thereof in vacation, and make satisfactory proof to such courts or judge in vacation, of the escape aforesaid, and that the person escaping owed service or labor to such party. Whereupon the court shall cause a record to be made of the matters so proved, and also a general description of the person so escaping, with



§ 838. The term *necessary* has a more obvious significance in reference to the end to be obtained by legislation than to the particulars of the law, or the means provided by the law for the end in view. Because, in attaining every proposed end, though some means are requisite, the means which are actually employed may not be necessary, that is, essential, if compared with others which might have been employed.<sup>1</sup>

It is principally the *propriety* of these Acts of Congress, or their conformity with other legal rules contained in the Constitution, which is here to be considered. But with regard to the necessity of the Act of 1850, or of any subsequent statute, it may be observed that the existence of a previous Act of Congress cannot be taken to diminish the power of Congress to enact another for the same purpose; because the adequacy of the existing Act to the necessities of the object is always a proper subject of the judgment of the legislator from whom it proceeded.<sup>2</sup>

The object of these Acts being assumed to be to carry into effect one or both of these provisions in the fourth Article, and that object being taken to be legitimate under either the

such convenient certainty as may be; and a transcript of such record, authenticated by the attestation of the clerk and of the seal of the said court, being produced in any other State, Territory, or district in which the person so escaping may be found, and being exhibited to any judge, commissioner, or other officer authorized by the law of the United States to cause persons escaping from service or labor to be delivered up, shall be held and taken to be full and conclusive evidence of the fact of escape, and that the service or labor of the person escaping is due to the party in such record mentioned. And upon the production by the said party of other and further evidence if necessary, either oral or by affidavit, in addition to what is contained in the said record of the identity of the person escaping, he or she shall be delivered up to the claimant. And the said court, commissioner, judge, or other person authorized by this act to grant certificates to claimants of fugitives, shall, upon the production of the record and other evidences aforesaid, grant to such claimant a certificate of his right to take any such person identified and proved to be owing service or labor as aforesaid, which certificate shall authorize such claimant to seize or arrest and transport such person to the State or Territory from which he escaped: *Provided*, That nothing herein contained shall be construed as requiring the production of a transcript of such record as evidence as aforesaid. But in its absence the claim shall be heard and determined upon other satisfactory proofs, competent in law.

Approved September 18, 1850.

<sup>1</sup> Osborne v. U. S. Bank, 9 Wheaton, 859; McCulloch v. The State of Maryland, 4 Wheaton, 316; United States v. Fisher, 2 Cranch, 358, 396.

<sup>2</sup> This seems to be the objection against the statute of 1850, so far as it is founded on the theory of vesting the judicial power of the United States, which is made in N. Y. Leg. Obs. Vol. IX. p. 7. I have seen a like objection in ephemeral publications, about the same date, to which I am not able particularly to refer.

second, third, or fourth of the several constructions before examined, their *propriety* is to be measured by their accordance with the extent of the constitutional provisions themselves in respect to *persons* and *jurisdictions*, and the original force of those provisions in sustaining the rights and obligations of either private or public persons, and also by the consistency of the *means provided* by the Acts for their proper object with other principles of public or private law, identified in their authority with the Constitution. This manifestly will depend in a great degree upon the view which is to be taken of the authority of these provisions in reference to public and private persons, and may differ accordingly as the second, third, or fourth of the constructions referred to is assumed for the basis of legislative power.

§ 839. In reference to the *persons* affected by these Acts of Congress, it is evident that since the provisions are themselves the law, and the legislation of Congress must be confined to the object of making them effectual according to their original extent, a statute can in no case be held to apply to any not included under the language of the Constitution itself. The legislation of Congress cannot extend to more persons or cases than are comprehended under the provisions, but it might be limited to a portion only of those persons who may, under the Constitution, be demanded as fugitives from justice, or claimed as owing service or labor by the laws of the State of their domicile. In that case the States demanding or the private persons claiming, under either provision, such fugitives as should not be included within the meaning of these Acts would still possess the same rights which, as demandants or claimants of fugitives, they would have had had there been no Act of Congress; and the judicial power of the United States could still be exercised to sustain those rights, if it could have been applied before the enactment of any statute. Such demandants or claimants might also apply to the executive or judicial officers of the State into which the fugitive demanded or claimed had escaped; and, by the separate authority of such State, recognizing its obligations under the Constitution, or under the ordinary private international law, the surrender or



delivery of such fugitive might be made by its proper officers. Whether such surrender or delivery could be made by either the executive or the judicial officers of one of the States without special local legislation, is a question partly of the exercise of judicial power by State officers under the national municipal law, which question has been considered in another part of this treatise,<sup>1</sup> and partly of the powers of the State executive and judicial officers under that international law which, acting on the State as a political person, is a law in the imperfect sense only, except as it may become identified with the local municipal law of that State,—which question should properly be taken up in a later portion of this work. For the claim, it is supposed, may be made either under this provision, operating as law in the strict and proper sense, or under international law, operating among the States as distinct nationalities.

In the earlier of these statutes the persons whose freedom may be drawn in question, whether as fugitives from justice or from labor, are described by the words used in the constitutional provisions. In the Act of 1850, sec. 6, 10, the person is described as held to service or labor, without adding “under the laws thereof.”

§ 840. In the cases of Bushnell and Langston, who had been convicted, in the United States District Court, under the last law, it was urged that the act charged in the indictment, which followed the statute in this particular, had not been shown to be criminal. Judges Brinkerhoff and Sutliff held that the indictment was therein defective; by not showing a case in which the District court had jurisdiction. 9 Ohio, 221, 323. The majority of the State court refused to examine into the validity of the indictment. Ibid. 183, 217. The question, being of the powers of courts on habeas corpus<sup>2</sup> and of criminal jurisprudence, cannot be here examined.

§ 841. The Acts of Congress, or of the States, intended to carry out the effect contemplated by this provision, may have been so worded as not to include all persons to whom the de-

<sup>1</sup> *Ante*, Vol. I. pp. 496-500.

<sup>2</sup> On the general topic, see R. C. Hurd on Habeas Corpus, &c., ch. 6, sec. 1-3.

scriptive terms of the provision itself will apply. In the case of John Davis, at Buffalo, August, 1851, it was held by Judge Conckling, of the U. S. District Court, that the provisions of the tenth section of the Act of September 18, 1850, were prospective and were not applicable to Davis, who had escaped on or about August 25, 1850.<sup>1</sup>

§ 842. The personal extent of these clauses of the Constitution has, it will be remembered, been considered in a previous chapter.<sup>2</sup> The Act of 1850 provides new means for carrying into effect the provision relating to fugitives from labor. If there is no legal right under the provision itself, or if the claim can be a matter of legal controversy only when a statute has been enacted to give it effect, it might be argued that the statute can extend only to cases of escape occurring after its enactment. But if the fourth construction of the provision is adopted, under which the owner's right of claim is a valid, legal right, independently of State or national legislation, the statute regards only the remedy to be applied in maintaining a pre-existent legal right, and the remedy given should be taken, on well-known principles,<sup>3</sup> to apply to all cases of escape, whether occurring before or after its passage. But the lapse of time has rendered the question, under these two Acts, of little practical importance.

§ 843. The purpose of the provisions in the fourth Article of the Constitution being to sustain in one State jurisdiction certain rights and obligations which originated under the local law of another, the Acts of Congress must not do more than sustain such rights and obligations as may be created or guaranteed by the provisions themselves. But in doing this it may be necessary and proper to create new rights and obligations, as accessory to and instrumental in sustaining the former. The nature and extent of these provisions, as they stand without the legislation of Congress, and the effect which they have in reference to the local jurisdictions of the several States, have already been considered. The ancillary rights and obligations created by the statutes are to be now examined as

<sup>1</sup> IV. West. L. Journal, 14; and IV. Mon. L. Rep. 159.

<sup>2</sup> *Ante*, Ch. XXV.

<sup>3</sup> See on retrospective statutes, 1 Kent, 455.



incidents of the means or instrumentalities provided by these statutes for carrying out the provisions.

The rights and powers which may be exercised under any provision of the Constitution can only be such as are in harmony with its other provisions, and the exhibition of any one such right or power requires, in fact, the exposition of a large portion of the Constitution. It is evident that the exercise or maintenance of any rights or powers under these statutes need here be examined only so far as they have practically been considered questionable in courts of law. The questions which are to be examined in considering the propriety of the means or instrumentalities provided by these statutes relate either to—

1. The tribunals, official persons, or public officers before or upon whom the demand or claim is to be made, and by whom the delivery is to be enforced.

2. The remedial process by which the demand or claim is to be presented, the proofs on which its legality is to be decided, and the method in which the delivery to the demandant or claimant is to be carried into effect and his custody maintained.

3. The penalties by which rights and obligations created by these provisions or by these statutes are to be secured and enforced.

§ 844. The first and second sections of the Act of 1793 constitute the only legislation of Congress relating to the delivery of fugitives from justice. The question which has arisen on this statute, in reference to the first of the above-named points of inquiry, is, whether it violates certain provisions in the Constitution of the United States<sup>1</sup> by conferring the judi-

<sup>1</sup> Art. III., Section 1. The judicial power of the United States shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish. The judges both of the supreme and inferior courts shall hold their offices during good behavior, and shall, at stated times, receive for their services a compensation which shall not be diminished during their continuance in office.

In Art. I., sec. 2, it is provided that the President shall nominate, and, by and with the advice and consent of the Senate, shall appoint, ambassadors, other public ministers and consuls, judges of the Supreme Court, and all other officers of the United States whose appointments are not herein otherwise provided for and which shall be established by law. But the Congress may, by law, vest the appointment of such inferior officers as they think proper in the President alone, in the courts of law, or in the heads of departments.

cial power of the United States on the Governors of the States?

The parallel question which has arisen on the other sections of the same Act, relating to the delivery of fugitives from labor, and on the Act of 1850, is, whether the same provisions of the Constitution have been violated in the first of these statutes by conferring the judicial power of the United States on the State magistrates mentioned in the third section, or in the last, by conferring the same power on the Commissioners named in the first section?

The question is, first, whether, by the Act of 1793, the judicial power of the United States has been conferred on the Governors of the States?

In this inquiry the *nature* and *source* of the power exercised by those Governors, when acting in the manner provided by the statute, is to be determined.

§ 845. The question of the nature and of the political source of the power exercised by the Governors of States in these instances does not appear to have been directly passed upon in any decided case, unless in the recent case in the Supreme Court of the United States, *Kentucky v. Dennison*.

In the Opinion delivered by Chief Justice Taney, it is expressly denied that the power exercised by the Governor of the State upon whom the demand is made, is judicial in its nature. It is affirmed that the duty of the Governor in such cases is "merely ministerial, without the right to exercise either executive or judicial discretion" (*ante*, p. 429), and that it is no "discretionary executive duty," no "discretionary duty upon which he is to exercise any judgment, but is a mere ministerial duty—that is, to do the act required to be done by him;" and his duty is, in the same place, declared to be like that of a marshal or sheriff. (*Ante*, p. 431.)<sup>1</sup>

<sup>1</sup> Compare language of Savage, Ch. J., in *Clark's case*, 9 Wend. 220 (which might have also been cited as anticipating Judge Taney in the view taken by him of the basis of legislative power, *ante*, § 818).—"Whether the prisoner is guilty or innocent, is not the question before us; nor is any judicial tribunal in this State charged with that inquiry. By the Constitution, full faith and credit are to be given in all the States to the judicial proceedings of each State. When such proceedings have been had in one State which ought to put any individual within it upon his trial, and those proceedings are duly authenticated, full faith and credit



§ 846. The Opinion being so express in denying the judicial character of the action of the Governors, the view taken therein of the political source of the power exercised by them, in this instance, may not be very material to the present inquiry, and the bearing of the judgment of the court, as well as of the language of the Opinion, on that point may be open to some doubt.

But, from the court's refusal to issue the mandamus, it would seem proper to infer that, whatever may be the powers or the duties of the Governors of the States upon whom the demand is made, they are not, in the opinion of that tribunal, derived from the Act of Congress, nor from any national law which may be enforced by the national authority. The language of the Opinion appears to agree with the same view. Judge Taney says the Act "does not import to give authority to the State Executive to arrest and deliver the fugitive, but requires it to be done, and the language of the law implies an absolute obligation which *the State authority* is bound to perform." (*Ante*, p. 433.) Though the judge goes on to say that this duty is created by the Constitution, and so, of necessity, regards it as a duty under the national law, still he does not regard it as a duty which, *as person* under law, the Governor can be required to perform. Notwithstanding his argument that, in the provision itself, the Governor of the State was contemplated as the person upon whom the demand is to be made (*ante*, pp. 427, 428), he says also that "the word 'duty,' in the law, points to *the obligation on the State* to carry it into execution." (*Ante*, p. 432.)<sup>1</sup>

This language is indeed to be reconciled with the denial of any "executive discretion" above noticed, but it would seem that Judge Taney would derive the Governor's authority from his being the representative of the State in the fulfillment of

shall be given to them in every other State. If such person flee to another State, it is not necessary to repeat in such State to which he has fled the initiatory proceedings which have already been had, but he is to be sent back to be tried where the offence is charged to have been committed—to have the proceedings consummated where they were begun."

<sup>1</sup> The view taken of the position of a State Governor in this matter by Judge Smith, in 3 Wisc. 35 (*ante*, p. 511), seems to agree with these observations of the Chief Justice.

a particular class of its duties, and, consequently, would regard his authority as politically derived from the State. In other words, Judge Taney, in language contradictory to that of Judge Pope in a case hereinafter cited,<sup>1</sup> would consider the power as official in the Governor, and not personal.

Whether the court's refusal of the mandamus is consistent with passages in the Opinion declaring the existence of an "absolute right" in the demanding party and "a correlative obligation" on the other side, and that, the right and obligation being established by the Constitution, "it became necessary to provide by law the mode of carrying it into execution,"<sup>2</sup> is not very material here to consider.

§ 847. Chancellor Kent, in the passage already cited from his Commentaries, seems to be the only juristical authority holding that the power exercised is judicial in quality.<sup>3</sup>

§ 848. In some of the cases under the law of 1850 (wherein an argument, that the action of the commissioners of the United States Courts is not judicial in character, is based on the doctrine that the power exercised by the latter, in respect to fugitives from labor, is of the same quality with that exercised by the Governors of States in respect to fugitives from justice) it is assumed, as beyond question, that the action of the Governors, under the law of 1793, is not an exercise of judicial power. In these instances, while it is admitted that the constitutionality of this Act of Congress in this respect has never been the subject of direct judicial decision, it is common to refer to the fact

<sup>1</sup> *Post*, § 849.

<sup>2</sup> *Ante*, pp. 428, 429.

<sup>3</sup> *Ante*, § 733. Similar authority for the same doctrine may be found in the bill, noted *ante*, p. 425. From a Report in the Legislature of Virginia, March 17, 1840 (*Va. Laws*, 1839, p. 155-166), it seems that the Legislature of Georgia had proposed an appeal to the Congress of the United States so to amend the statutes heretofore passed upon that subject as to authorize the demand in the cases contemplated to be made upon the circuit judge of the United States having jurisdiction in the State where the fugitive may be found. The Committee of the Virginia Legislature "has decided objections, and it cannot withhold the expression of its regret that Georgia, with whom Virginia will make common cause, should recommend it. In the first place, the surrender of a fugitive from justice is properly an executive duty," &c. And, on p. 166, the Committee say that there would be danger of collision between the State and the Federal authorities, and that they are unwilling to have the subject of slavery discussed in this way in Congress, on the introduction of Virginia. The report was on the controversy with New York, *ante*, p. 10. An inference as to the character of the action may be founded on the statute which places the extradition of fugitives in the District of Columbia within the powers of the Chief Justice of the District. *Ante*, p. 24.

<sup>4</sup> also the law of Kentucky, *ante*, p. 15, n., and of Indiana, *ante*, p. 129, n.



that the Governors of States have repeatedly made the delivery required, and that their power to do this in a proper case has never been questioned. It has been common to quote Judge Story's statement of this argument in Prigg's case.<sup>1</sup>

This "acquiescence," as Judge Story called it, or this acting in the manner contemplated by the statute, is indeed evidence that the Act has not been considered unconstitutional, and, as regards the present inquiry, that the power exercised by the Governors is not the judicial power of the United States. But the conclusion is the same, whatever may be the *nature* of the power, if that power is *not derived from the United States*. From the use made of this conclusion in sustaining the legislation respecting fugitives from labor, it will be seen that the important inquiry is, whether, in denying that the power exercised by the Governor is the judicial power of the United States, it is the *quality* of the power or the *source* of the power which is referred to. Judge Story, in the place cited, had no reference to the question of the nature of the power exercised by the Governors of States. He was arguing only in support of the power of Congress to legislate in reference to the subject; which power is here assumed to exist. The power of a Governor of a State to act in the manner contemplated in these sections of the Act of 1793 has never been questioned in the cases arising under them, but whether the decisions sustaining his action involve the proposition that his action is not an exercise of power properly belonging to the judiciary, under the clause of the Constitution above cited, depends on the question, whether he is held in those cases to be exercising powers derived from the national Government, or a power incident to his office as State Executive. If his power in this respect is derived by the United States, then the precedents sustaining his action may be taken to affirm that the power is not judicial power, in its quality.

§ 849. It was held, in *Ex parte Smith* (1842), 3 McLean's C. C. R. 129, 131, by Judge Pope, that the Governor of Illinois had acted as the instrument or appointee of the national

<sup>1</sup> 16 Peters, 620, *ante*, p. 472; and see McLean, J., to the same effect, 16 Peters, 665, and Swan, Ch. J., 9 Oh. 190.

Government, and not as the officer of the State; that the Act of Illinois requiring him to make such surrender, while it may have imposed upon him a duty, conferred no power, and did not make him the instrument of the State. The judge says:—"The power is not official in the Governor, but personal." It might have been granted to any one else by name. But considerations of convenience and policy recommended the selection of the executive who never dies."

But it may be doubted whether this theory has been uniformly adopted.<sup>1</sup> The statute, it will be noticed, does not direct upon whom the demand shall be made by the Executive of the State from which the alleged criminal fled, but contemplates cases in which that demand, accompanied by certain specified proofs, shall have been made upon the Executive of the State into which such criminal has fled. It is true that it then declares what "shall be the duty" of the latter in such case; and if a duty is imposed by the Act, it would appear that some authority must have been at the same time conferred.<sup>2</sup>

§ 850. In all or nearly all the States Acts have been passed to enable the Executive to make the delivery of a fugitive from justice according to the constitutional provision;<sup>3</sup>

<sup>1</sup> But the language of the Act is singularly inappropriate to this view of the power. The words are:—"It shall be the duty of the executive authority of the State to," &c.

<sup>2</sup> In Prigg's case, 16 Peters, 664, Judge McLean seems to have justified the action of the State magistrates in delivering up fugitives from labor as the exercise of power politically derived from the State, not from the United States (*post*, § 870); and referring to the compliance of the Governors of States with the provisions of the Act, he draws this parallel between their action and that of the State magistrates:—"Now, if Congress may by legislation require the duty to be performed by the highest State officer, may they not on the same principle require appropriate duties in regard to the surrender of fugitives from labor by other State officers?" "Appropriate duties" must mean duties appropriate to the offices they should be holding under the State. It would seem that Judge McLean would hardly have agreed with Judge Pope, in Smith's case, that the power in the Governor is not official, but personal.

<sup>3</sup> In *Ex parte Smith*, 3 McLean, 181, it is said that the Act directs the demand to be made upon such Executive. Story, J., in Prigg's case (16 Peters, 620, *ante*, p. 473), speaks of the Act "which designated the person (the State Executive) upon whom the demand should be made."

<sup>4</sup> See *ante*, the statutes empowering the Governor to deliver up fugitives from justice noted under laws of Virginia, p. 8; Kentucky, p. 15; Massachusetts, pp. 31, 33; Maine, p. 34; New Hampshire, p. 36; Connecticut, pp. 42, 43, 48; New York, p. 58; Tennessee, p. 94; Illinois, p. 136; Michigan, p. 138; Wisconsin, p. 142; Alabama, p. 163; Louisiana, p. 165; Missouri, p. 169; Arkansas, p. 172; Minnesota, p. 177; Minnesota, p. 178; Kansas, p. 187; Florida, p. 193; California, p. 217.



and 'it is a question whether, under the State Constitutions, that power does not belong to the executive department independently of any legislation. Unless it is to be held that the Act of Congress puts an end to the concurrent legislative (juridical) power of the State on the subject,' there seems no reason for holding that the Governors do not exercise *State* power in making the delivery. That power would, of course, have no effect beyond the limits of the State. The second section of the Act of Congress makes the custody of the alleged criminal, in the hands of the agent of the claiming State, lawful, if not so independently, under the Constitution, in every other State through which it may be necessary that he should pass. But even if this statute was necessary to give legality to that custody beyond the limits of the surrendering State, still it does not follow that the power originally exercised by the Governor, in ordering the delivery, was not power politically derived from that State.

§ 851. But whatever may be the existing authority for the doctrine that the action of the Governors of States, on delivering up a fugitive from justice on demand, does not involve an exercise of the judicial power of the United States, still the correctness of that doctrine may be independently examined.

It has already been argued here that the only power which Congress has to legislate in reference to this provision of the Constitution is the power to carry into execution the judicial power of the United States in cases arising under it, according to the fourth construction.<sup>2</sup> If, then, the Governors of States, acting in the manner contemplated in the statute, derive their power from the Act of Congress, and if they do carry into effect the whole purpose of the provision, which seems unquestionable,<sup>3</sup> the conclusion appears inevitable that they have been invested with the judicial power of the United States. The action of a Governor in allowing or refusing the demand

<sup>1</sup> Compare *ante*, Vol. I, p. 492.

<sup>2</sup> *Ante*, §§ 831, 832.

<sup>3</sup> In the Opinion by Taney, Ch. J., in *Kentucky v. Dennison*, the execution of the provision is attributed to the combined exercise of the judiciary of the State from which the person charged fled, and the Governor of the State in which he is found. But this view can be sustained only by attributing legal operation to the criminal law of the demanding State in the other State. *Ante*, §§ 818-820.

made upon him under the Act, seems to cover the whole "case" supposed to have been the subject of the judicial power anteriorly to the legislation of Congress. It cannot be taken to be ancillary or ministerial in respect to the decision of any "case" which arises under the provision. If, by the action of the State Executive, the "case" which was within the judicial power has been completely disposed of, that action is very different from that of persons exercising a ministerial office ancillary to the power held by the judges of courts.<sup>1</sup>

But if, as is commonly held, Congress has legislated in virtue of authority to carry into execution a power vested in the Government as a whole, under the second or under one adaptation of the third construction of the constitutional provision,<sup>2</sup> there is no such necessary conclusion that the power exercised under the Act is the judicial power. The question, whether it is so or not, must then be determined from the essential nature of the action, without reference to the basis of legislation.

§ 852. In support of the doctrine that the action of the Governors of States contemplated in the Act of 1793 is not an exercise of that kind of power which in the public law of the United States and of the several States is called "the judicial power," it seems very natural to argue that such action is not distinguishable from that which takes place in surrendering persons claimed by foreign governments as fugitive criminals, either under treaty or under customary international law, and that it has been always held that such surrender falls within the executive and not within the judicial function.

It will probably be found that in every American case of extradition to foreign governments, some inquiry as to its propriety in the particular instance has been made by some person officially connected with the judiciary.<sup>3</sup>

<sup>1</sup> In *Sims' case*, IV. Monthly L. R., 6-8, Mr. Commissioner Curtis seems to have based the legislation of Congress on the theory of carrying into execution the judicial power of the United States. But he avoids the conclusion in the text by holding that the action of the Executive in the one case, and of commissioners in the other, is ministerial or ancillary to the judicial power which was to be carried into execution in these cases. But Mr. Curtis has not shown when or where this judicial power is carried into execution, if not by the Executive and the commissioner.

<sup>2</sup> *Ante*, § 791.

<sup>3</sup> The 27th article of the treaty with Great Britain, of 1794 (VIII. St. U. S. 129), provided for extradition on such evidence of criminality as, according to the



§ 853. The argument of Mr. Marshall, afterwards the Chief Justice, in the House of Representatives, Feb. 20, 1800, on resolutions condemning the President's action in Nash's or Robbins' case, is regarded as the leading authority for the doctrine that this judicial inquiry is not an exercise of the co-ordinate judicial power or function, and that it properly takes place as subordinate and ancillary to the executive function.<sup>1</sup>

laws of the place where the fugitive or person charged shall be found, would justify his apprehension and commitment for trial if the offence had been there committed. No provision is made for the action of judicial officers. The 10th article of the treaty with Great Britain, of 1842 (*ibid.* 572), provides for issuing warrants "by the respective judges and other magistrates of the two governments" "to the end that the evidence of criminality may be heard and considered" before them; and "if, on such hearing, the evidence be deemed sufficient to sustain the charge, it shall be the duty of the examining judge or magistrate to certify the same to the proper executive authority, that a warrant may issue for the surrender of such fugitive." The treaty with France, 1843 (*ibid.* 580), provides that the surrender on the part of the Government of the United States "shall be made only by the authority of the Executive thereof;" and this "only when the fact of the commission of the crime shall be so established as that the laws of the country in which the fugitive or the person so accused shall be found would justify his or her apprehension and commitment for trial if the crime had been there committed." No provision is made for the action of judges or magistrates. The Act of 1848, entitled *An Act for giving effect to certain treaty stipulations*, &c. (IX. Stat. U. S. 302), vested power, jurisdiction, and authority, in the judges of the United States courts, and in any commissioner authorized for the purpose by those courts, and in the judges of the State courts to issue warrants on complaint, to hear the evidence of criminality, and if, on such hearing, the evidence should be deemed sufficient to sustain the charge under the treaty, to certify the same, with the testimony, to the Secretary of State, who was authorized to issue a warrant of extradition. On the decision of the Supreme Court in Metzger's case (1846), 5 How. 176, this Act must be considered as declaratory of pre-existing law. To the same effect is Woodbury, J., in *The British Prisoners* (1845), 1 Woodbury and Minot, 72. *Contra* is Judge Edmonds in Metzger's case, 1 Barbour, 257, and according to the note, *ib.* 258, Judge Story was of the same opinion.

<sup>1</sup> A full history of this case and the debates in the House is given in 1 Hall's Journ. of Jur. 18, and Wheaton's State Trials, 393. Marshall's speech is also in 5 Wheaton, App. I., and with the report of the case in Bee's Rep. 266. President Adams had requested Judge Bee, U. S. Dist., to arrest Robbins, "and to inquire whether or not he was guilty of the offence charged against him." The Judge, having satisfied himself of his guilt, reported to the President, and afterwards, by his direction, delivered the prisoner to the agent of the British Government. Mr. Marshall argued that the case was one for executive and not judicial decision. He admitted the division of powers stated by the supporters of the resolutions, but objected to the declaration contained in them, "that the judicial power extends to all questions arising under the Constitution, treaties, and laws of the United States. The difference between the Constitution and the resolutions was material and apparent. A case in law or equity was a term well understood and of limited signification. It was a controversy between parties which had taken a shape for judicial decision." If the judicial power, he argued, were thus extended to every question, instead of "all cases arising," &c., the judiciary would encroach on the other functions. "By extending the judicial power to all cases in law and equity, the Constitution had never been understood to confer on that department

Though this argument may have quieted the House, it seems to have failed at the time to satisfy public opinion of the propriety of the President's course.<sup>1</sup>

§ 854. The doctrine that the power exercised by the judicial officer is simply ministerial and ancillary to the executive function, seems also to be affirmed by Tilghman, J., in *Commonwealth v. Deacon* (Short's case), 10 Serg. & Rawle, 134, and by Woodbury, J., in *The British Prisoners*, 2 Woodbury and Minot, 66. *Holmes v. Jennison*, 14 Peters, 540, is by some authorities understood as affirming the necessity of co-ordinate judicial action; see Lewis' Cr. Law, 263; Edmonds, J., in 1 Barbour, 265.

§ 855. In the year 1854, Thomas Kaine, on the application of the British consul, and without any direction from the executive department of the national Government, was committed to custody by "a commissioner appointed by the Circuit Court of the United States,"<sup>2</sup> after a hearing before him, to abide the order of the President of the United States in the premises.

The validity of this commitment was affirmed by Judge

any political power whatever. To come within this description, a question must assume a legal form for forensic litigation and judicial decision. There must be parties to come into court who can be reached by its process and bound by its power, whose rights admit of ultimate decision by a tribunal to which they are bound. A case in law or equity proper for judicial decision may arise under a treaty, when the rights of individuals, acquired or secured by a treaty, are to be asserted or defended in court,—as under the fourth or sixth article of the treaty of peace with Great Britain, or under those articles of our late treaties with France, Prussia, and other nations, which secure to the subjects of those nations their property within the United States, or as would be an article which, instead of stipulating to deliver up an offender, should stipulate his punishment, provided the case was punishable by the laws and in the courts of the United States. But the judicial power cannot extend to political compacts, as the establishment of the boundary line between the American and British dominions; the case of the delivery of a murderer under the 27th article of our present treaty with Britain." The main argument which then follows is that the judicial power cannot be exercised because the actual delivery or extradition is not within the capacity of the courts, but is a political and executive act.

<sup>1</sup> Catron, J., in Kaine's case, 14 How. 111. The Act of Virginia, 21 Jan., 1801, R. C. of 1819, p. 589, c. 161. 1 Robinson's Practice, p. 8. And the history of the controversy in 1 Hall's Journ. 18, and Wharton's State Trials, 393. But Judge Story has said, somewhere, that it "put the question at rest forever:"—quoted by Edmonds, J., in Metzger's case, 1 Barbour, 265.

<sup>2</sup> The commissioner being appointed under the Act of February 20, 1812, *An Act for the more convenient taking of affidavits and bail in civil causes depending in the courts of the United States*, II. St. U. S. 679, and the supplementary Acts, Mar. 1, 1817, III. Ib., 350; Aug. 23, 1842, sec. 1, V. Ib. 516; and the rule of the Circuit of 1851, see 14 How. 142, 143.



Betts, who, on habeas corpus before him as Judge of the Circuit Court, remanded the prisoner. When return was made to Mr. Justice Nelson, as Judge of the Supreme Court at chambers, on another habeas corpus issued by him, he directed that it should be heard at the ensuing term, before the full bench. Upon this proceeding, as improper, no jurisdiction was taken by the court; but petition was made to the court for a writ of habeas corpus and certiorari, to bring up the proceedings before Judge Betts, in the Circuit Court, in exercise of its appellate power. (*In re Kaine*, 14 Howard, 118, 130.)

In the present inquiry it is material to know whether the court regarded the prisoner as then in custody under the original commitment by the commissioner, or under the decision of Judge Betts. A conclusion respecting the quality of the power exercised in declaring the prisoner within the terms of the treaty, could be drawn from the decision of the court only if the legality of the custody was based upon the action of the commissioner.<sup>1</sup>

Mr. Justice Curtis, who was the only member of the court who distinctly affirmed the prisoner to be in custody under the commissioner's warrant, in denying the motion, held that it could be granted, if at all, only in the exercise of the appellate and revisory power of the court, and that that power could not be here exerted because the acts of a commissioner cannot be the exercise of the judicial power. His language is (14 How. 119, 120):—"That no such control, by means of an appeal, writ of error, or other proceeding, can be exercised by this court over a commissioner acting under the authority of an Act of Congress, or under color of such an authority; and that this court has no power in any way to revise his proceedings, I consider equally clear. In *Ex parte Metzger*, it was determined that a writ of habeas corpus could not be allowed to examine a commitment by a district judge at chambers un-

<sup>1</sup> A like inference might be drawn from a decision affirming the validity of a custody under a commitment by one of the "judges of the State Courts," mentioned in the Act of 1848, if it were equally necessary to suppose that in making it he had exercised power politically received from the United States. It is for the present assumed that the action of a State judge should be considered as an exercise of the concurrent judicial power of the State. In the *British Prisoners*, 1 Wood. and Minot, 66, it was held by Woodbury, J., that his action is ministerial.

der the treaty between the United States and France for the reason that the judge in ordering the commitment exercised a *special authority*, and the law had made no provision for the revision of his judgment.<sup>1</sup> The same reason applies to the action of this commissioner. Not only has the law made no provision for the revision of his acts by this court, but, strictly speaking, he does not exercise any part of the judicial power of the United States. That power can be exerted only by judges appointed by the President, with the consent of the Senate, holding their offices during good behavior, and receiving fixed salaries." (Referring to Const., Art. 3, sec. 10.)<sup>2</sup>

A conclusion against extending the appellate jurisdiction to the act of a commissioner would follow from this reasoning, whatever might be the quality of the power exercised. The

<sup>1</sup> In the matter of Metzger (1846), 5 How. 176. He had been committed by Judge Betts of the U. S. District Court at chambers. Application being made to the Supreme Court of the U. S. for habeas corpus to review the action of the district judge, the question was of the extent of the appellate jurisdiction of the Supreme Court, and of its power to issue the writ under sec. 14 of the Judiciary Act. In the Opinion of the court, by McLean, J., ib. 191:—"There is no form in which an appellate power can be exercised by this court over the proceedings of a district judge at his chambers. He exercises a *special authority*, and the law has made no provision for the revision of his judgment. It cannot be brought before the District or Circuit Court; consequently, it cannot, in the nature of an appeal, be brought before this court." If it is determined by this decision that the power exercised was not judicial because the action was done at chambers, it must be held that the quality of an act of judgment depends on the place in which it is performed. But Judge McLean said, ib. 188:—"The mode adopted by the Executive in the present case seems to be the proper one. Under the provisions of the Constitution, the treaty is the supreme law of the land, and, in regard to rights and responsibilities growing out of it, may become a subject of judicial cognizance. \* \*

Whether the crime charged is sufficiently proved, and comes within the treaty, are matters for judicial decision; and the Executive, when the late demand for the surrender of Metzger was made, very properly, as we suppose, referred it to a judicial officer." Judge Edmonds, of the State Court, afterwards discharged the prisoner; holding not merely that some act of legislation was necessary (1 Barbour, 257-261), but also that co-ordinate judicial power must be exercised in carrying a treaty of this kind into effect. Judge Edmonds (ib. 262) forcibly presents the alternative—either the action of the judiciary here is *judicial power* and co-ordinate, or the Executive applies to the judiciary only as convenient, and may dispense with it altogether. Of the latter alternative he says:—"Such is the claim presented before me, and, if established, then is the liberty of the citizen, at least as respects extradition, subjected to executive discretion to an extent that is calculated to alarm even a country where freedom, in the aggregate, is so common that its invasion in detail is too often and too easily disregarded. [Remarkable words!] To meet an objection so formidable in its character, it is urged that the aid of the judiciary must of necessity be invoked in the execution of the treaty."

<sup>2</sup> Judge Curtis could hardly have meant that the capacity or incapacity of a person to exercise the judicial power of the United States determines whether his action is an exercise of judicial power. But his language is not far from such



Supreme Court could revise the exercise of judicial power only when exercised by persons thereto qualified under this clause of the Constitution. But Judge Curtis intends to affirm expressly that the power exercised by the commissioners, in this matter, is not judicial power in its quality. This appears from his reference to Metzger's case, and also by his declaring (ib. 120) the power exercised by the commissioners to be of the same quality as that of a district judge and the Secretary of the Treasury under the treaty with Spain, of 1819, for the settlement of certain claims against the United States. The justness of this parallel will be considered hereafter.

Four other justices also refused the motion, though not taking Judge Curtis' position on the question of appellate power,<sup>1</sup> but on the merits. They affirmed Judge Betts' decision as correct; and, since he had remanded the prisoner to the custody in which he was held under the commissioner's warrant, they must be taken to have held that the commissioner had not in his action exercised the judicial power of the United States.

But the Opinion of this majority, delivered by Mr. Justice Catron, Justices McLean, Wayne, and Grier concurring, seems to support the doctrine that the action of the commissioners and judicial magistrates designated in the Act, in these cases, is not subordinate or ancillary to that of the executive function, but an exercise of the co-ordinate judicial function.<sup>2</sup>

<sup>1</sup> If the Supreme Court must refuse to hear appeals in cases where persons are in custody by commitment of a U. S. commissioner or U. S. judge at chambers, the only way the question of conflict of jurisdiction can be brought to the arbitration of the Supreme Court, under the present system, is by carrying it through the State courts. See Judge Edmonds in Metzger's case, 1 Barbour, 266-267, and Mitchell, J., in Heilbronn's case, 1 Parker Cr. 438.

<sup>2</sup> After referring to Robbins' case, Judge Catron said, 14 How. 112:—"But a great majority of the people of this country were opposed to the doctrine that the President could arrest, imprison, and surrender a fugitive, and thereby execute the treaty himself, and they were still more opposed to the assumption that he could order the courts of justice to execute his mandate, as this would destroy the independence of the judiciary in cases of extradition, and which example might be made a precedent in other cases; and from that day to this the judicial power has acted in cases of extradition, and all others, independent of executive control." And, on page 113:—"Congress obviously proceeded on this public opinion when the Act of 1848 was passed, and therefore referred foreign powers to the judiciary when seeking to obtain the warrant and secure the commitment of the fugitive, and which judicial proceeding was intended to be independent of executive action on the case. And such has been the construction and consequent practice under the Act of Congress and treaty by our executive department, as we are informed

A minority, consisting of three judges, regarded the prisoner as in custody under Judge Betts' decision as circuit judge,<sup>1</sup> and were in favor of issuing the writs asked for on the merits, and also on the ground (as would seem from the Opinion delivered by Mr. Justice Nelson, Chief Justice Taney and Mr. Justice Daniel concurring) that a previous demand on the Executive and some action on his part must in these cases precede the action of the judges and commissioners mentioned in the Act of Congress. From this it would appear that these judges regarded the action of the judge or commissioner as ancillary to the executive power, and not co-ordinate judicial power.<sup>2</sup>

From the two opinions it appears that, with the exception of Judge Curtis, all the members of the court regarded the action of the commissioners and judicial magistrates mentioned in the Act as being so far judicial in quality as to be beyond the sphere of the executive department; while, in admitting that the power therein exercised may be held by a commissioner, they must be taken to affirm with Judge Curtis that it is not the judicial power of the United States.<sup>3</sup>

on application to that department." (In *Kaine's case*, the Secretary of State had decided "that the Government would not go behind the decision of the commissioner adjudging the prisoner guilty." See *Nelson, J.*, 14 How. 139.) On page 110, *Catron, J.*, had said:—"That an executive order of surrender to a foreign government is purely a national act, is not open to controversy; nor can it be doubted that the executive act must be performed through the Secretary of State by order of our chief magistrate representing the nation. But it does not follow that Congress is excluded from vesting authority in judicial magistrates to arrest and commit preparatory to a surrender."

<sup>1</sup> These judges held that the commissioner, to act in these cases, should, under the statute, have been specially appointed; that the general powers of the commissioners could not extend to them.

<sup>2</sup> Judge Nelson, however, does not affirm that the only power exercised is that vested in the executive department. After holding that the course taken in *Robbins' case* had been sustained by later authorities, 14 How. 139, 140, he says:—"And it is upon this construction given to the treaty of 1795 upon which all our subsequent treaties of extradition seem to have been drafted. The power to surrender is not confided exclusively to the Executive under the treaty of 1795. On the requisition being made, if the President is satisfied, upon the evidence accompanying it, that a proper case is presented for an inquiry into the crime charged, the authorities claiming the fugitive are referred to the judiciary, and then it is the duty of courts or judges to act and to take the proper steps for the arrest and inquiry. The Executive alone possesses no authority under the Constitution and laws to deliver up to a foreign power any person found within the States of this Union without the intervention of the judiciary. The surrender is founded on an alleged crime, and the judiciary is the appropriate tribunal to inquire into the charge."

<sup>3</sup> Mr. Cushing, U. S. Atty. Gen., in his opinion in *Calder's case*, Aug. 31, 1833, relying on the opinions in *Kaine's case*, says:—"The arrest, examination, and de-



§ 856. It has been argued that pecuniary claims against the United States have often been referred to special commissioners, and to official persons not holding the judicial power of the United States. That when referred to judges of the national courts, it has been held that their action therein was the exercise of a special power and not the judicial power,<sup>1</sup> and that the decision of a demand under treaty for the person of a fugitive criminal is analogous. Such was the argument of Mr. Justice Curtis in *Kaine's case*, 14 How. 120, and of Marshall in *Robbins' case*.

But it must be noticed that the rights which are thus claimed under treaty are not *legal* rights; except as they may be made such under some law of Congress intended to carry the treaty into effect; because the correlative obligation is not a legal obligation, since it is due by a sovereign who makes the treaty and, by it, the rights. By the

cision of fact, are purely judicial acts. They are not and cannot be performed by the President."—6 Op. U. S. Atty. Gen. 95; and that the judge "acts by *special authority* under the law of Congress. \* \* He does not exercise any part of what is technically considered the judicial power of the United States." *Ib.* 96. From these authorities it appears that the difficulty is avoided by distinguishing some of the judicial power of the United States as *special authority*, and that the Constitution must be understood as meaning—the judicial power of the United States, so far as it is not *special authority*, shall be vested, &c., or that the functions of the Government are the legislative, the executive, the judicial, and the *special*.

<sup>1</sup> By the treaty of 1819, with Spain, it was agreed that the United States "shall cause satisfaction to be made for the injuries, if any, which, by process of law, shall be established to have been suffered by the Spanish officers, and individuals, Spanish inhabitants, by the later operations of the American army in Florida." By certain Acts, Congress directed the United States district judge to adjudge claims for losses, and to report his decisions, if in favor of the claimants, together with the evidence, to the Secretary of the Treasury. In *United States v. Ferreira*, 13 How. 47, held that no appeal could be made, from such an award, to the Supreme Court. Taney, Ch. J.:—"The decision is not the judgment of a court of justice. It is the award of a commissioner. The Act of 1834 calls it an award. And an appeal to this court from such a decision, by such an authority, [as?] from the judgment of a court of record, would be an anomaly in the history of jurisprudence. An appeal might as well have been taken from the awards of the board of commissioners under the Mexican treaty, which were recently sitting in this city." On p. 48:—"The powers conferred by these Acts of Congress, upon the judge as well as the secretary, are, it is true, judicial in their nature. For judgment and discretion must be exercised under both of them. But it is nothing more than the power ordinarily given by law to a commissioner appointed to adjust claims to lands or money under a treaty, or special powers to inquire into or decide any other particular class of controversies in which the public or individuals may be concerned. A power of this description may constitutionally be conferred on a secretary as well as on a commissioner. But it is not judicial in either case, in the sense in which judicial power is granted by the Constitution to the courts of the United States." See further, pp. 49, 50, 52, noting *Hayburn's case*, 2 Dall. 409, and *United States v. Todd*, *ib.* n.

treaty, the United States concede something voluntarily which it was in their discretion to withhold; and, by the statute, they appoint the manner in which they will carry out their concession and on what evidence they will admit the existence of the facts. In these cases the national Government is like a private person who, from a sense of moral obligation or of self-interest, voluntarily consents to grant something to another, and who determines on the extent of his proposed concession in any way he chooses. He may determine this by an act of mental judgment, or by chance, as by a cast of dice, or he may appoint another to decide for him by either of such methods, or by any other. In these cases the Government acts, throughout, autonomously, and not under law, and the commissioner is its agent.<sup>1</sup>

It seems to be forgotten that in the instance of extradition there is a third party, the alleged criminal, whose right to life and liberty within the jurisdiction of the United States is to be determined under law, whether it be treaty, or statute, or common law.

§ 857. If the national and State courts may adjudge on habeas corpus whether the prisoner is within the terms of the treaty,<sup>2</sup> it can only be in the exercise of their ordinary judicial power. Yet the question thus presented to the court is the same which had been passed upon, before, by a commissioner or a judge at chambers.

§ 858. For the present inquiry, it is very important to notice that it seems to be held that the act of judgment exercised in these cases is not distinguishable in quality from that used

<sup>1</sup> The Government may be taken to occupy a similar position in respect to its delinquent collecting agents on whose property the supervisors of the treasury department were authorized to levy, by an Act of 1820. Judge Marshall, in *Randolph's case*, 2 Brock. C. C. R. 448, 480, treated the power exercised as ministerial, though intimating that, if its quality were to be determined, it might be the judicial power of the United States.

<sup>2</sup> That is, if they may not merely inquire into the existence of the commitment, but may go behind the decision of a commissioner or even the mandate of the President, as held in *Metzger's case*, 1 Barbour, 248; *Heilbronn's case*, 1 Parker's Cr. 436. The opinions of the Supreme Court in *Metzger's* and *Kaine's* cases would imply that the United States Courts have power to make this inquiry. Whether the State courts can in like manner inquire into the propriety of a commitment by a Governor under the Constitution and Act of Congress, is unsettled. See *R. C. Hurd on Habeas Corpus*, 615. In *Ex parte Smith*, 3 McLean, 130, the power of a United States court to make this inquiry is affirmed.



in ordinary commitments under the law of the forum of jurisdiction with reference to trial before some court in the same forum;<sup>1</sup> and that such commitments may be made by officers not holding the judicial power of the United States referred to in the Constitution (Art. 3, sec. 1), seems indisputable.

It is, perhaps, on the truth of this parallel that the question depends, whether the act of delivering up a person claimed as a criminal under treaty or under customary international law does or does not involve an exercise of what is properly called judicial power.

In the ordinary arrest of a criminal there is no finality with reference to the forum in which it is made and the law upon which his continued enjoyment of personal liberty ultimately depends. In the case of extradition for the purpose of trial in a foreign jurisdiction, the liberty of the accused is *finally* determined upon, so far as regards the forum and the protection which its laws had extended to him, as fully as by a judicial sentence of banishment or outlawry. The surrender or extradition is a single and completed judicial act in reference to the jurisdiction in which it is made and to the liberty of the supposed criminal under its laws. It has all the elements of a sentence or judgment under punitive law. It is not ancillary, by any juridical connection, to the prospective judgment in the foreign jurisdiction, but is simply its historical antecedent.<sup>2</sup>

§ 859. The distinction above stated, between the act of judgment in ordinary commitments and that in cases of international extradition, seems never to have been fairly considered. Its force in reference to the questions here presented may perhaps be avoided by an argument like the following :

It is a fundamental principle of public and private law in all civilized countries (universal jurisprudence) that each na-

<sup>1</sup> Catron, J., *in re Kaine*, 14 How. 110:—"According to the terms of the statute, no doubt is entertained by me that the judicial magistrates of the United States, designated by the Act, are required to issue warrants and cause arrests to be made at the instance of the foreign Government, on proof of criminality, as in ordinary cases when crimes are committed within our own jurisdiction and punishable by the laws of the United States." Also, Woodbury, J., in *British Prisoners*, 1 Woodbury and Minot, 73; *Kentucky v. Dennison*, *ante*, p. 431.

<sup>2</sup> See, in connection, *ante*, §§ 463-465.

tion recognizes every other as a jural society, one which regards justice as the end of government and of law, and that each will regard itself as one in a great community of states existing for the maintenance of justice. Hence, each recognizes as just the rights and obligations which exist in relations created under the private law of other nations; and in this is the foundation of that basal rule of private international law which is generally called *comity*.<sup>1</sup>

On the same great principle, it may be said, each nation will recognize the penal procedure of other nations to be calculated to promote the ends of justice; to this degree—that, if it agrees to deliver persons charged with crimes against a foreign law, it will trust in the justice of penal administration in the foreign country, and will not interpose in behalf of the accused those guarantees against the abuse of public power which it maintains against that abuse under its own authority; that, to the extent of the treaty, the nation making extradition will regard the two countries as parts of one great community under one punitive law, so that, in the jurisprudence of the country by which it is allowed, the extradition is like the commitment within one district, as a county, for trial in another district, of a person charged with crime under the law of a single forum of jurisdiction in which the two districts are included.<sup>2</sup>

§ 860. But from this collateral inquiry it is necessary to return to the actual question—of the nature of the power exercised by the Governors of States under the constitutional provision.

If the argument in the last section be sufficient to answer the objection in the case of extradition to a foreign government, it will apply *a fortiori* between the several States.

If the principle on which it rests is not to be recognized as determining the application of a treaty between distinct nations, yet, such is the similarity of penal administration in the

<sup>1</sup> *Ante*, §§ 33, 77, 78.

<sup>2</sup> Some such principle must be assumed to maintain the legality of extradition under a customary international law (as Kent, in 1 Comm. 37), and, in governments founded on written constitutions, to authorize an international compact of extradition, when the constitution has not defined the treaty-making power.



States, that a like principle might be assumed to have legal force between them in applying the constitutional provision,—especially if the fourth construction is to be adopted, by which it acts directly on the alleged criminal, and if it may be regarded as intended to continue, in substance, the *quasi*-international law of the colonial period.<sup>1</sup> May it not be asserted that, by the provision, with or without the law of Congress, the two States, in respect to the commitment in the one and the prospective trial in another, are made one jurisdiction—the criminal laws of the two being, for the instance, connected by the national law—so that between the arrest in one and the trial in the other there is the same continuous operation of law which is manifested in the two proceedings when they take place under the law of one and the same State?

§ 861. In the opening of this chapter a second and a third inquiry were proposed on points which might be considered under the law of Congress, the second point or subject being—

2. The remedial process by which the demand is to be presented, the proofs on which its validity is to be decided, and the method in which the delivery to the demandant State or Executive is to be carried into effect, and custody of the accused maintained, to the end of his being “removed to the State having jurisdiction of the crime.”

The only question under this head which will be here examined<sup>2</sup> is, whether the law of Congress is in any respect in violation of any guarantee in the Constitution operating as a bill of rights.

§ 862. Whether the Act of 1793, secs. 1, 2, and the cases in which alleged fugitives from justice have, either with judicial approval or without any appeal to the courts, been delivered

<sup>1</sup> In the English cases, *Rex v. Warner*, *Lundy's case*, *Rex v. Kimberly*, *Mure v. Kay* (see *ante*, p. 396, note), the judges seem only to have considered the question whether, on the assumption that the prisoners had committed the felonies charged in the colony, it was lawful to send them thither for trial. It seems to have been left with the Council or the Secretary of State, and the inferior magistrates acting under their authority, to determine on the sufficiency of the preliminary proof and to carry out the extradition by giving proper warrants.

<sup>2</sup> Other points under this head are considered very fully in *A Treatise on the Right of Personal Liberty and the Writ of Habeas Corpus, and the Practice connected with it, with a View of the Law of Extradition of Fugitives*, by Rollin C. Hurd, published 1858, B. III. ch. 1, 2, where the leading decisions on the practice in these cases are given.

up by the Governors of States, in the manner and under the circumstances contemplated in that Act, are authorities in this inquiry, depends upon the question, whether the Governor of a State, in making such delivery, acts in virtue of authority derived from the national Government, or authority derived from the several State of which he is the executive officer. There seems no sufficient authority for affirming that the power is derived from the national source.<sup>1</sup>

If, under any statute, the delivery of a fugitive from justice should be made by authority conferred by Congress, it would seem necessary to determine the effect of the clause in the second section of the third Article, directing that "the trial of all crimes, except in cases of impeachment, shall be by jury;" of clauses in the fifth Article of the amendments, "that no person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except," &c., "nor be deprived of life, liberty, or property, without due process of law;" and of the sixth Article, which prescribes the mode of trial in criminal cases.

Clauses similar to these are probably to be found in all the State Constitutions. The instances in which Governors of States have made the delivery contemplated by the statute, either without appeal or with judicial sanction, may be taken as authority that these clauses in the Constitution of the United States are not infringed by a like exercise of authority conferred by Congress.<sup>2</sup>

Admitting that "due process of law" in bills of rights comprehends trial by jury,<sup>3</sup> yet this exposition is founded on the history of common-law jurisprudence in England and America, as affording the interpretation of terms of constitutional and statutory declarations. The same historical criterion must be taken to limit the meaning of the terms "deprived of life, liberty, or property," and the whole clause, in the ad-

<sup>1</sup> See examination of the question, *ante*, §§ 845-850.

<sup>2</sup> In no reported case has the guarantee of trial by jury been urged against the validity of the action of the Executive. In 12 Wend., 324, '5, Nelson, J., avoiding the force of the corresponding objection against the Fugitive-slave law, said—"The same argument also might be used, with a greater show of reason, in favor of the power of the state to regulate the surrender of fugitives from justice."

<sup>3</sup> See *post* in Ch. XXX.



ministration of punitive justice, may fairly be taken to apply only to judicial action which is conclusive in disposing of the life, liberty, or property of the person whose right to their retention is in question, and not to the preliminary means of bringing such person within such action on the part of some tribunal. In these cases of extradition the act of judgment which takes place is indeed conclusive in and for the State jurisdiction in which it takes place, and, therefore, as has just been argued, may involve an exercise of judicial power. Still, the anterior international or *quasi*-international practice of the States and colonies may be referred to to determine whether, under this guarantee, a jury is to be held part of that due process of law through which judicial power should be exercised in cases of extradition of persons accused of crime. Referring to such practice, as shown by the English cases hereinbefore cited, it might be well argued that the decision should be on a summary and informal inquiry.

Or, the solution of this difficulty may be found in that blending of two jurisdictions, in cases of extradition, which has already been suggested.<sup>1</sup>

The first provision in the fifth amendment may, however, be reasonably thought to require that a delivery, under authority conferred by Congress, should be awarded only on the presentment or indictment of a grand jury of the State wherein the crime is alleged to have been committed.<sup>2</sup>

§ 863. The third and remaining inquiry regards—

3. The penalties by which rights and obligations created by this provision, or by ancillary legislation of Congress, may be secured and enforced.

A penalty of fine and imprisonment for rescuing a fugitive

<sup>1</sup> *Ante*, §§ 859, 860.

<sup>2</sup> This question may be distinguished from that of the effect of the word *charged*, in the provision, which was noticed, *ante*, § 709. It may be urged that with this requirement the offender will escape in the majority of cases. To the argument *ab inconvenienti*, which is constantly coming up under these Acts of Congress, it is sufficient to answer, that it proves altogether too much to be admitted in determining power of Congress. The difficulty would be avoided by recognizing the true limits of that power, and thereby giving room for the concurrent action of the States, in many of which laws have been passed providing for the preliminary arrest of supposed fugitive criminals, and for notice to the Executive of the State from which they escaped. But, if the doctrine of *Prigg's* case be consistently applied, such laws are void. See *ante*, p. 129, n. 1.

criminal from the agent who shall have received him or her in his custody, while transporting him or her to the State or Territory from which he or she shall have fled, is declared in the second section of the Act. If the right of holding in custody the person charged is a legal right under the Constitution or under the statute, it would seem to be within the power of Congress to guard it by any fine, not "excessive," or any punishment, not "cruel and unusual."<sup>1</sup>

<sup>1</sup> Article 8 of the amendments:—Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.



## CHAPTER XXIX.

DOMESTIC INTERNATIONAL LAW OF THE UNITED STATES. THE SUBJECT CONTINUED. OF THE LEGISLATION OF CONGRESS IN RESPECT TO FUGITIVES FROM LABOR. WHETHER THE PUBLIC OFFICERS NAMED IN THE TWO SEVERAL ACTS OF CONGRESS MAY CONSTITUTIONALLY DELIVER UP A FUGITIVE FROM LABOR ON CLAIM, AS THEREIN PROVIDED.

§ 864. In considering the means provided by Congress for carrying into effect the provision for the delivery of fugitives from labor with reference to the three points of inquiry stated in the previous chapter,<sup>1</sup> the first question is—

1. Whether the Act of 1793, in conferring certain powers on the State magistrates mentioned in the third section, and the Act of 1850, in conferring the same powers on the Commissioners named in the first section, are in violation of those provisions of the Constitution which determine the investiture of the judicial power of the United States.

No part of the Act of 1793 is directly repealed by that of 1850, whose title reads, "*An Act to amend, and supplementary to, an Act entitled,*" &c., and it is not stated specifically in what parts the older Act is amended. The Act of 1850 differs from the older statute in respect to the tribunals or official persons who may carry out the law. It gives to the commissioners appointed by the United States circuit courts, or by the superior court of each organized Territory of the United States, like powers with the judges of the circuit and district courts of the United States, in granting certificates, and makes no mention of any officers appointed by the States. But, the law of 1793 being unrepealed, it would seem that the magistrates of

<sup>1</sup> *Ante*, p. 607.

counties, cities, and towns corporate, mentioned in the third section, may still act as in that law is provided, if they could have so acted before 1850.

In determining the constitutionality of the Act of 1793, under the question above stated,<sup>1</sup> several cases are to be considered.

§ 865. In *Commonwealth v. Holloway* (1816), 2 S. and R. 305,<sup>2</sup> the keeper of the city prison returned to the *habeas corpus*, that the child, Eliza, was held "by virtue of a warrant of commitment issued by Samuel Badger, Esq., an associate judge of the Court of Common Pleas." The child was discharged on another ground. (*Ante*, p. 412.) But, on the hearing, it appeared that the mother of the child had been apprehended in Philadelphia, "as the slave of James Corse, and delivered to him, as such, by a magistrate, after an examination of her case." There is nothing to indicate who this magistrate was. But it seems probable that the mother and child, together, had been committed by the judge of the Common Pleas. There is no mention of any dispute as to the validity of the proceeding in the case of the mother.

In *Hill v. Low* (1822), 4 Wash. C. C. 327 (*ante*, p. 439), the defendant had obstructed the plaintiff when, as claimant, he had seized or arrested the fugitive slave with the purpose, as was alleged, of taking him "before a magistrate of the said city" of Philadelphia "in order to prove before him," &c. But it does not appear that an application was actually made to any magistrate or judge, and no certificate had been granted, and there is nothing in the Opinion delivered by the judge of the United States Circuit Court which bears on the question under consideration.<sup>3</sup>

In *Worthington v. Preston* (1824), 4 Wash. C. C. 461, the

<sup>1</sup> See the objection stated by counsel in *Prigg's case*, 16 Peters, 582.

<sup>2</sup> *Butler v. Hopper* (1806), 1 Wash. 396, *ante*, p. 409, was not a case within the provision. In *Glen v. Hodges* (1812), 9 Johns. 67, *ante*, p. 438, the plaintiff had seized the slave without any warrant, and, it seems, was about to remove him from the State without applying to any officer of the State or of the United States, when his custody was interrupted by the act of the defendant. There is nothing in the circumstances or in the language of the court throwing any light on the question here considered.

<sup>3</sup> In *Ex parte Simmons* (1823), 4 Wash. C. C. 396, *ante*, p. 409, the application for a certificate was made to the judge of the United States Court.



action was against the goaler for the escape of a fugitive held under a certificate for removal, granted by some magistrate who is described in the report as a "State judge." There was no question of the validity of a custody under the certificate. The goaler was held not responsible, on other grounds.

§ 866. In *Wright v. Deacon* (1819), 3 S. and R. 62 (*ante*, p. 438), the detention of the slave under a certificate, granted according to the Act of Congress, by Judge Armstrong, of the Common Pleas Court of Philadelphia, was supported by the Supreme Court of the State, on motion to quash the writ *de homine replegiando* issued to take the slave from such custody. No question appears to have been made of the source of the authority exercised by the State magistrate.<sup>1</sup>

§ 867. In *Jack v. Martin* (1834),<sup>2</sup> 12 Wendell, 311, the case was commenced by the issue of a writ of habeas corpus by the Recorder of the city of New York, as provided by the State law of 1828;<sup>3</sup> and the Recorder had, on hearing the return, given a certificate as provided by that law. A writ of replevin, as allowed by the same statute, was then issued from the Superior Court of the city of New York, and the defendant, Martin, put in avowries, relying on the certificate given by the Recorder, and also on the allegation that the plaintiff, Jack, "was, and still is, her slave." To these avowries the plaintiff put in several pleas, to some of which the defendant

<sup>1</sup> In *Commonwealth v. Griffith* (1823), 2 Pick. 11, *ante*, p. 440, the question was of the right of the claimant without a warrant to seize the alleged slave for the purpose, as must be supposed, of taking him before an officer authorized by the Act to give a certificate. An application had previously been made to a judge of the United States District Court, who had decided that a warrant to seize, for that purpose, was not necessary. It may be inferred that, if any application for the certificate was contemplated, it was to have been made to the same tribunal. The case, therefore, is no authority in the present inquiry.

The case, *Fanny v. Montgomery* (1828), 1 Breese, Ill. 188, was trespass. The plea was a justification under a justice's warrant, under the law of 1793. The plea was held bad for deficiency in certain allegations, but the court did not pass on the question of the force of the warrant. Judge Lockwood:—"I have not deemed it necessary, in making up an opinion in this cause, to give an opinion on the question how far a certificate which is good *prima facie* can be inquired into. Whether such a certificate would be final and conclusive, does not arise on this plea. We are not required, by the state of the pleadings, to go into any such inquiry; on this point, therefore, I forbear; for sufficient unto the day is the evil thereof." Unfortunately, such judicial reticence has been the exception, and not the rule, in questions of slavery.

<sup>2</sup> In *Johnson v. Tompkins* (1833); 1 Bald. 571, *ante*, 441, the owner had attempted to remove the slave without applying to any public authority.

<sup>3</sup> Of the Rev. Statutes. See *ante*, p. 57.

demurred, and to the others pleaded issuably. In the Superior Court, judgment was given, *on the demurrer*, for the defendant, Martin, and on this judgment writ of error was taken to the Supreme Court. The Opinion of the court was given by Judge Nelson.

From this Opinion, it appears that in the argument before this court it was alleged that the proceedings before the Recorder were in conformity with the Act of Congress. Judge Nelson, while recognizing the fact that the Recorder had intentionally followed the State law in his proceedings, held that that law was void, and yet justified the custody in which the plaintiff was held, as legal under the Act of Congress.

The question, whether the Recorder, who had begun by issuing process (for which the Act of Congress makes no provision), as provided by the State law, with the purpose of acting under that law, could be taken to have performed an action provided for by a law of Congress, was probably raised as distinctly in the Supreme Court as it was in the Court for the Correction of Errors.<sup>1</sup>

Chancellor Walworth, in the court of last resort, maintained the validity of the State law, and, consequently, must have regarded the Recorder as exercising powers derived from the State. The Chancellor maintained the power of Congress to legislate only so far as it might be employed in vesting the judicial power of the United States. But at the same time said, 14 Wend. 527 (*ante*, p. 451, n.): "The Act of February,

<sup>1</sup> See the reporter's note, 12 Wend. 314. The plaintiff in error's 4th point, 14 Wend. 512:—"An officer of the State of New York can only take such jurisdiction as our statute allows; and the defendant, by applying to a State magistrate for the remedy given by our law, has consented to be governed by the same throughout." Judge Nelson, 12 Wend. 315:—"The case under consideration is supposed to involve the constitutionality of this law of Congress [of 1793], and, in result, that of this State, which provides for the arrest of fugitive slaves in a manner in some respects different from the law of Congress. \* \* \* This replevin suit is under the provision of the State law. The defendant, in the Superior Court, set up in defence, that the plaintiff was her slave, and acknowledged the taking, by virtue of proceedings alleged to be in conformity to the Act of Congress." It does not appear from the pleadings, as reported, that this was alleged in the Superior Court of the city of New York, where the replevin suit was brought. On page 316, Judge Nelson said:—"I assume, for the present, that the proceedings before the Recorder were substantially in conformity to the Act of Congress, and may be sustained thereby if it is valid." On p. 325:—"That the proceedings before the magistrate were in form under the law of the State which required the issuing of a writ of habeas corpus, I apprehend cannot materially affect this case."



1793, conferring ministerial powers upon the State magistrates, and regulating the exercise of the powers of the State executive, is certainly not a law to carry into effect the judicial power of the United States, which power cannot be vested in State officers.<sup>1</sup>

The Court for the Correction of Errors decided the case in favor of the claimant without reference to the constitutionality of the law of Congress, and, it would seem, without reference to the validity of the State law, and simply on the ground that by the pleadings the plaintiff had admitted that he was the slave of the defendant. 14 Wend. 507.

If, then, under the decision of the Supreme Court, or of the Court for the Correction of Errors, the plaintiff was regarded as in custody under the action of any public authority whatever, it must have been held that he was in custody under the certificate given by the Recorder as one of the State magistrates mentioned in the Act of Congress of 1793, and in conformity to the provisions of that statute.<sup>2</sup>

But, assuming this to have been held, the source of the power exercised by the Recorder in such case does not appear to have been here inquired into any more than in the case of *Wright v. Deacon*. And it will be noticed that these two

<sup>1</sup> Here the Chancellor appears to determine the quality of the power by the official capacity or incapacity of the person who is to use it. The Judiciary Committee of Mass. Ho. of Rep. (*ante*, p. 453, n.), 17 Am. Jurist, 97, say,—"The Committee after a full investigation of the question believe that this part of the law is unauthorized and void. It is a well settled principle that Congress cannot confer any part of the judicial power of the United States on State magistrates or officers." The Committee was more logical than the Chancellor in the dictum, above quoted, which seems to be the germinal authority that the delivering up a fugitive from labor, on claim, as provided by the two Acts of Congress, is a ministerial act.

<sup>2</sup> As the case stood under the State law, the only question before the court was that raised by the demurrer—whether the claimant, being a resident of the State of New York at the time, could, under the provision, claim the negro as owing service and labor in Louisiana. Judgment being given on this demurrer, the issues of fact in the Superior Court were to be decided by a jury. (14 Wend. 513.) There was nothing in the proceedings which could establish any connection between the custody in which the negro was held and the Act of Congress. Under Judge Nelson's decision disallowing the operation of the State law, that custody had no support either from the law of the State or the Act of Congress, and could, in fact, be justified only on the doctrine (afterwards proclaimed in *Prigg's* case, where its origin was ascribed to this Opinion of Judge Nelson, *ante*, p. 554, n. 1) of seizure and removal without reference to any public inquiry. Much in the Opinion which at first seems to justify that doctrine (12 Wend. 316, 325, 326) may have been intended only to affirm a right to seize the fugitive for the purpose of making the claim under the Act of Congress.

cases are the only ones in the series in which the custody of a fugitive slave, under a certificate granted by a State officer, has actually been sustained by a judicial decision.<sup>1</sup>

§ 868. In Prigg's case (1842), 16 Peters, 539, the negro claimed had been arrested on a warrant issued by "a justice of the peace in and for the county of York," who, however, when such negro had been brought before him by the plaintiff for the purpose of procuring the certificate provided for by the Act of Congress, refused to take any farther action in the matter.<sup>2</sup> The plaintiff had thereupon forcibly removed the negro from the limits of the State.

The decision of the Supreme Court of the United States, therefore, could not have confirmed any actual proceeding of any person claiming official authority to carry out the provisions of the statute. But Judge Story, delivering the Opinion of the court, thought proper to examine the constitutionality of the law of Congress "in all its leading provisions," although beyond all controversy, such an inquiry was not essential to the decision of the case.<sup>3</sup>

But on the particular question, whether certain persons who, in the Opinion, are called *State magistrates*, may act as provided in the statute, Judge Story expressly said that it was "not free from reasonable doubt and difficulty." The brief portion of the Opinion which relates to this point is on 16 Peters, 622; see *ante*, p. 474.

§ 869. Judge Wayne began by saying, 16 Peters, 636:—"I concur altogether in the Opinion of the court as it has been given by my brother Story. In that Opinion it is decided," &c., and then states seven points as decided, in none of which is the question of the power of these *State magistrates* touched upon. The residue of Judge Wayne's Opinion is exclusively directed to the point, that the power of Congress to legislate is exclusive of all *legislative* action on the part of the States.<sup>4</sup>

<sup>1</sup> In Helmsley's case (1836), *ante*, pp. 64, 453, the prisoner had been arrested on a warrant issued by Judge Haywood, of the county of Burlington, but in the case he is supposed to have acted under the law of the State of New Jersey.

<sup>2</sup> He had made the writ returnable before himself; 16 Peters, 556. The Act of Congress had not provided for any such writ. By sec. 3 of the State law of 1825-6, justices of the peace might issue a warrant in these cases, returnable before a judge of a court therein designated; but, by sec. 9, they were forbidden to take jurisdiction under the law of Congress. See *ante*, p. 71.

<sup>3</sup> *Ante*, pp. 456, 491.

<sup>4</sup> See the citation, *ante*, p. 481.



Judge Daniel considered the discussion of the constitutionality of the Act of Congress improper in this case, and declined giving an opinion on the point. 16 Peters, 650, and *ante*, p. 488.

Judge Baldwin agreed with the court in the only question properly before it: that is, whether the judgment of the court of Pennsylvania against Prigg should be annulled. "But he dissented from the principles laid down by the court as the ground of their opinion." No written Opinion was delivered by him. See *ante*, p. 491.

Judge Thompson did not refer to this question. In the beginning of his Opinion he said that he had not been able to yield assent to all the doctrines embraced in the Opinion delivered by Judge Story. 16 Peters, 633; *ante*, p. 484.

§ 870. Of the other members of the court, only Judges Taney and McLean referred to the action of the State magistrates. Chief Justice Taney appears to have held, in the language of Story, above cited, that *State magistrates* "may, if they choose," act under the statute, or exercise authority in the manner therein provided; but said (16 Peters, 630) that "the State officers mentioned in the law are not bound to execute the duties imposed upon them by Congress, unless they choose to do so, or are required to do so by a law of the State; and the State Legislature has the power, if it thinks proper, to prohibit them."

Mr. Justice McLean considered this question of the duty of these *State magistrates* more fully than had either Judge Story or Judge Taney. On page 664 he says:—"It seems to be taken as a conceded point in the argument, that Congress had no power to impose duties on State officers, as provided in the above Act. As a general principle, this is true; but does not the case under consideration form an exception? Congress can no more regulate the *jurisdiction of the State tribunals* than a State can define the *judicial power of the Union*. The officers of each Government are responsible only to the respective authorities under which they are commissioned. But do not the clauses in the Constitution in regard to fugitives from labor and from justice give Congress a power over State offi-

cers on these subjects? The power in both the cases is admitted or proved to be exclusively in the federal Government.

"The clause in the Constitution preceding the one in relation to fugitives from labor declares," &c. (quoting the clause):

"In the first section of the Act of 1793, Congress have provided that, on demand being made as above, 'it shall be the duty of the executive authority to cause the person demanded to be arrested,' &c. The constitutionality of this law, it is believed, has never been questioned. It has been obeyed by the Governors of States, who have uniformly acknowledged its obligations. To some demands surrenders have not been made; but the refusals have in no instance been on the ground that the Constitution and Act of Congress were of no binding force. Other reasons have been assigned. Now if Congress may, by legislation, require this duty to be performed by the highest State officers, may they not, on the same principle, require appropriate duties in regard to the surrender of fugitives from labor by other State officers? Over these subjects the constitutional power is the same. In both cases the Act of 1793 defines on what evidence the delivery shall be made. This was necessary, as the Constitution is silent on the subject. The Act provides that, on claim being made of a fugitive from labor, 'it shall be the duty of such judge or magistrate to give a certificate that the person claimed owes service to the claimant.' The Constitution requires," &c. The remainder of the portion of Judge McLean's argument on this point, from pp. 665, 666, has already been cited, *ante*, pp. 487, 488.

§ 871. The constitutionality of the law of 1793 in respect to the question under consideration has not been discussed, and appears not to have been involved in any of the cases which have arisen under that statute since the date of *Prigg's* case.<sup>1</sup>

<sup>1</sup> In *Jones v. Van Zandt* (1842-3), 2 McLean, 597, *ante*, p. 492, *Driskill v. Parrish* (1847), 3 McLean, 631, *ante*, p. 497, and *Kauffman v. Oliver* (1849), 10 Barr. 516, *ante*, p. 494, the action was for harboring and concealing, and there could have been no question of the validity of a certificate. Though in *Driskill v. Parrish* there had been a seizure by the claimant, with intention, as was declared, of taking the fugitives before "a judicial officer." *Ante*, 497, n. 2. So in *State v. Hoppess* (1845), 2 West, L. J. 289, *ante*, p. 496, the claimant had brought his supposed slave before a justice, when the habeas corpus interrupted the proceedings.



But it is here proper to notice the *quasi* authorities on this point which have been elicited in the examination of the similar question in cases under the Act of 1850. In some of these cases it has been either implied or positively asserted that the magistrates of counties, cities, and towns corporate spoken of in the Act of 1793, or the *State magistrates* mentioned in the cases, exercise power which is derived from the United States but which is not part of the judicial power of the United States.

Among these authorities, which will hereinafter be fully cited, is the decision in Sims' case. The language of Chief Justice Shaw referring to the force of the objection taken to the action of State magistrates, is to be particularly noticed. It had been objected that the law of 1850 vested in the U. S. commissioners the judicial power of the United States, and it seems to have been *assumed* on all hands in that case that the action of the *State magistrates* under the law of 1793, which had been judicially sanctioned in earlier cases, involved the exercise of power of the same *quality*, derived from the same *source*.<sup>1</sup> Judge Shaw, 7 Cushing, 303, said:—"If this argument, drawn from the Constitution of the United States, were now first applied to the law of 1793, deriving no sanction from contemporaneous construction, judicial precedent, and the acquiescence of the General and State Governments, the argument from the limitation of judicial power would be entitled to very grave consideration."

But in a passage which has been cited (*ante*, p. 60, note) from Judge Marvin's charge on the trial of Allen, the judge describes the power which State magistrates exercised, in proceeding according to the Act of 1793, as "State judicial power."

§ 872. In *Wright v. Deacon*, the Supreme Court of Pennsylvania sustained a custody under a certificate granted according to the Act of Congress by a judge of the Common Pleas Court of Philadelphia. In *Jack v. Martin*, the Supreme

<sup>1</sup> The positive assertion, that the power of the State magistrates who could have acted under the law of 1793 was power not derived from the States but from the United States, appears never to have been made in any instance until declared by Mr. Comm. Loring in Burns' case; see *post*.

Court, and the Court for the Correction of Errors, of New York, sustained the custody when the certificate had been granted by the Recorder of the city of New York. These cases are direct authority that persons holding these offices may perform that action which "magistrates of counties, cities, and towns corporate," are, by the law of 1793, empowered or permitted to perform.

In Prigg's case there was no actual custody under a certificate. If an opinion as to the constitutionality of the Act in this respect was not extra-judicial, it must be held that, in order to judge whether the Act of Pennsylvania was valid or not, it was necessary to prove not only that Congress had legislated on the same subject, but that their actual legislation was in all points constitutional.<sup>1</sup>

But, passing over this objection, it appears that although the court, speaking by Judge Story, admitted that in "that part which confers an authority upon State magistrates" the Act is not "free from reasonable doubt and difficulty," and only the Chief Justice, with Justices Story and McLean, appear to have given it any attention, Judge Story spoke of "this court" as entertaining no doubt "that State magistrates may, if they choose, exercise the authority" granted or permitted by the law, or, as he otherwise expresses it, "act under" the law; and Judge McLean and the Chief Justice differed only on the point whether the State magistrates were bound to act, or only might act if they should think fit.

From these *dicta* it has been supposed, in Sims' case and in all other cases under the law of 1850, that the Supreme Court must be taken to have held, in this case, that *any magistrate of a*

<sup>1</sup> See *ante*, p. 491, note 3. It seems very questionable whether the court can decide on the constitutionality of provisions in a statute which do not affect the parties in the case before them; even when other provisions of the same statute do affect those parties. It was not pretended in this case that the statute of Pennsylvania would have interfered with the action of the claimant if he had proceeded according to the Act of Congress. If the State law was invalid only because in conflict with the law of Congress, it would have been necessary to prove that the latter was constitutional in that particular in which it was antagonistic to the State law. The decision in this case was not merely that a State statute in conflict with a valid Act of Congress is void; it was, that the legislation of Congress annuls all State legislation on the same subject-matter, though such legislation may not be void as in conflict with the Constitution.



county, city, or town corporate, may grant a certificate as provided by the Act of Congress, and that the custody of the claimant under such certificate will be valid. And, as regards our present inquiry, the Opinion of the court has been taken as authority that the power exercised by such "magistrates of counties, cities, and towns corporate," is not the judicial power of the United States.

But the conclusion is the same, whatever may be the nature of the power, if that power is *not derived from the United States*. From the use made of this decision in cases under the law of 1850, when the question was of the *quality* of the power exercised by the commissioners of the United States courts, it will be seen that the important inquiry here is, whether, in denying that the power exercised by the "magistrates of counties, cities, and towns corporate" is the judicial power of the United States, it is the *quality* of the power or the *source* of the power which is referred to.<sup>1</sup>

§ 873. In the passage in the Opinion of the court above cited, Judge Story speaks of part of the Act as that "which *confers* an authority upon State magistrates," and of "the authority *conferred* upon State magistrates." From this use of the word *confer* it may be argued that, in his view, the power exerted by these State magistrates would be power politically derived from the United States.

But Judge Story, in the same passage, intimated that by State legislation these magistrates might be prohibited from exercising the authority thus "conferred." Now, whenever a citizen of one of the States may, consistently with the public law of the United States, exercise authority politically proceeding from the sovereign powers held by the national Government, there certainly can be no power in State legislation to prohibit his exercise of that power. It is his right to accept the office, and the State cannot interfere with the performance of the duty he will then owe the national Government. His civil and political rights arising out of his allegiance and citizenship in respect to the powers held by the

<sup>1</sup> See *ante*, p. 611, a similar inquiry stated as to the power exercised by the Governors of the States in delivering fugitives from justice.

national Government are co-existent and in perfect harmony with the rights and duties which arise from his allegiance and citizenship in respect to the sovereign powers held by the State of which he is an inhabitant. If the law of Congress is constitutional in respect to the public law of the United States, his power to act or not to act in the manner prescribed by Congress is a matter with which the State, in the fullest exercise of its "reserved" powers, has nothing to do.<sup>1</sup> If, then, Judge Story held that the power to be exercised by these *State magistrates* would be held by them personally, or as private individuals merely, designated or described as being citizens holding the office of State magistrate, and that it would not be a power incident to their functions in the office conferred by the State, there was no propriety in referring to the State Legislatures as having power to forbid their acting in the mode prescribed by Congress.

§ 874. In the passage cited from his Opinion, Chief Justice Taney likewise says that "the State Legislature has the power, if it thinks proper, to prevent" these State magistrates from acting. From his saying that they were under no more obligation to accept a power or office under the Act than are other persons, it would seem to have been his opinion that if they should "choose" to act they would exercise power politically derived from the United States. But from other passages in his Opinion, when arguing in favor of concurrent State legislation, it seems that Judge Taney considered the State as the source of the authority exercised in these cases by the State magistrate. On p. 630 of the report his language is:—

"Indeed, if the State authorities are absolved from all obligation to protect this right, and may stand by and see it violated without an effort to defend it, the act of Congress of 1793 scarcely deserves the name of a remedy. The State officers mentioned in the law are not bound to execute the duties imposed upon them by Congress, unless they choose to

<sup>1</sup> It is not disputed that a State may deprive those who will act under the law of Congress of the office of State magistrate, and thus, virtually, may prohibit the magistrate from acting as prescribed by the national law. See the law of Massachusetts of 1838, *ante*, p. 33.



do so, or are required to do so by a law of the State; and the State legislature has the power, if it thinks proper, to prohibit them. The act of 1795, therefore, must depend altogether for its execution upon the officers of the United States named in it. And the master must take the fugitive, after he has seized him, before a judge of the District or Circuit Court, residing in the State, and exhibit his proofs, and procure from the judge his certificate of ownership, in order to obtain the protection in removing his property which this act of Congress professes to give.

"Now, in many of the States there is but one district judge, and [631] there are only nine States which have judges of the Supreme Court residing within them. The fugitive will frequently be found by his owner in a place very distant from the residence of either of these judges, and would certainly be removed beyond his reach, before a warrant could be procured from the judge to arrest him, even if the act of Congress authorized such a warrant. But it does not authorize the judge to issue a warrant to arrest the fugitive; but evidently relied on the State authorities to protect the owner in making the seizure. And it is only when the fugitive is arrested and brought before the judge that he is directed to take the proof and give the certificate of ownership. It is only necessary to state the provisions of this law in order to show how ineffectual and delusive is the remedy provided by Congress, if State authority is forbidden to come to its aid.

"But it is manifest from the face of the law, that an effectual remedy was intended to be given by the act of 1793. It never designed to compel the master to encounter the hazard and expense of taking the fugitive, in all cases, to the distant residence of one of the judges of the courts of the United States; for it authorized him, also, to go before any magistrate of the county, city, or town corporate wherein the seizure should be made. And Congress evidently supposed that it had provided a tribunal at the place of the arrest, capable of furnishing the master with the evidence of ownership to protect him more effectually from unlawful interruption. So far from regarding the State authorities as prohibited from in-

terfering in cases of this description, the Congress of that day must have counted upon their cordial co-operation. They legislated with express reference to State support. And it will be remembered that, when this law was passed, the government of the United States was administered by the men who had but recently taken a leading part in the formation of the Constitution. And the reliance obviously placed upon State authority for the purpose of executing this law, proves that the construction now given to the Constitution by the Court had not entered into their minds."

It seems to have been the Chief Justice's opinion that the *State magistrates* of whom he spoke would have no power to act as therein provided, unless thereto authorized by State legislation. It is even doubtful whether he interpreted the Act of Congress as empowering them to hear the proof of claim and give the certificate, or only as authorizing them to make the commitment preparatory to a hearing before a judge of some one of the national courts.<sup>1</sup>

§ 875. As regards Judge McLean's argument from the supposed constitutionality of the action of Governors of States in delivering up fugitives from justice, its whole force turns on the questions—whether it is or is not an exercise of power derived from the United States, and—whether it is not, by custom of nations, appropriated to a different function of the Government. These have already been considered.<sup>2</sup> Judge McLean says that "the power in both cases is admitted or proved to be in the federal Government," from which the inference would seem to follow that the action of the State magistrates could be an exercise of federal or national power only. But then he also argues that Congress may require this action from State magistrates, because it is a fulfillment of the duty of the State. His views, on the whole, appear to be that, though the permission to act is ultimately dependent on the will of Congress, yet the power which would be exercised

<sup>1</sup> If he contemplated the *State magistrate* as only empowered to arrest the fugitive for the purpose of having him brought before a United States judge who should take proof and grant the certificate, the authority of the Chief Justice is directly for the reverse of that for which this case has been taken in the question of the power exercised by the commissioners under the law of 1850.

<sup>2</sup> *Ante*, pp. 611-613.



by the State magistrates would be power politically derived from the State, and not from the United States. And this was probably the view of the other judges who considered the question.

§ 876. It will be objected that, since "magistrates of counties, cities, and towns corporate," have no power, in virtue of their office under the State Government, to act in the manner prescribed by the Act of Congress, the court, in maintaining the right of *such* persons to act in the manner so prescribed, must be taken to justify such action as the exercise of power politically derived from the United States; and that hence, in the present inquiry, the court must be taken to have decided that the power so exercised is not judicial in *quality*.<sup>1</sup>

But it will be noticed that the several judges always use the term *State magistrates*; and the question occurs, whether the court, or any single member of the court, intended to declare that the action prescribed by the Act of Congress might be performed by any person who may come within the description of *magistrate of a county, city, or town corporate*.

§ 877. The word *magistrate* has a very indeterminate use in our language. It is sometimes used to designate the possessor of the supreme power, but more commonly it is applied to judges of courts holding power strictly judicial, and to persons holding an inferior or more limited judicial power in connection with powers nearly connected with the administrative department of the Government.<sup>2</sup> The extent of the functions of magistrates of the last class depends, both in England and America, upon special statutes, or is limited by well-established customary law. In Jacob's Law Dictionary, *voc. Magistrate*, it is said, "The rights and dignities of *mayors* and *aldermen*, or other magistrates of particular corporations, are more private and strictly municipal rights, depending entirely upon the domestic constitution of their respective franchises. The magistrates and officers whose duties are most generally in use and have a jurisdiction dispersedly throughout the kingdom

<sup>1</sup> This must have been the reasoning of Judge Shaw in *Sims' case*, 7 Cushing, 302, 308, and of Judge Nelson in his charge to the grand jury, Blatchford's C. C. R., 643. See *ante*, Vol. I., p. 501, n. 2.

<sup>2</sup> *Ante*, Vol. I., pp. 508-510.

are principally these: *sheriffs, coroners, justices of the peace, constables, surveyors of the highways, and overseers of the poor.*"

§ 878. It may have been that the court regarded the action of the Governors of the States, in delivering up fugitives from justice conformably to the Act of Congress, as an exercise of power derived from the State, on the ground that the provision in respect to fugitives from justice created a duty on the part of the State to deliver the fugitive when demanded by another State (adopting the first or the second construction), and that the power to act for the State in such international relation is incidental to the executive function.<sup>1</sup> But even if the court regarded the other provision as creating a like duty on the part of the State in respect to fugitives from labor (adopting the same construction), they could hardly have regarded an officer whose jurisdiction is limited to a county, city, or town corporate, as having, in virtue of his office, the like power to act for the State as a political person.

§ 879. It is important to notice that though, in the Opinion of the court, the question, whether Congress has power to legislate for the purpose of carrying the provision into effect, is very fully considered as preliminary to the question, whether, by such legislation, the States are precluded from passing any law on the same subject-matter, yet the constitutionality of the Act, in its details, is not argued, except by referring to the earlier cases. This is on page 621 of the report, where the court say:—"It [the validity of the Act of 1793] has naturally been brought under adjudication in several States in the Union, and particularly in Massachusetts, New York, and Pennsylvania, and on all these occasions its validity has been affirmed. The cases cited at the bar, of *Wright v. Deacon*, 5 Serg. and Rawle, 62; *Glen v. Hodges*, 9 Johns., 67; *Jack v. Martin*, 12 Wend., 311; *S. C. 14 Wend.*, 507; and *Com. v. Griffith*, 2 Pick., 11, are directly in point. So far as the judges of the courts of the United States have been called upon to enforce it, and to grant the certificate required by it, it is believed that

<sup>1</sup> *Ante*, § 848.



it has been uniformly recognized as a binding and valid law, and as imposing a constitutional duty."<sup>1</sup>

It is true that, on the same page, Judge Story says :—"But we do not wish to rest our present opinion upon the ground either of contemporaneous exposition, or long acquiescence, or even practical action ; neither do we mean to admit the question to be of a doubtful nature, and therefore as properly calling for the aid of such considerations. On the contrary, our judgment would be the same if the question were entirely new, and the Act of Congress of recent enactment. We hold the Act to be clearly constitutional in all its leading provisions, and, indeed, with the exception of that part which confers authority upon State magistrates," &c. The statement of the doubt on this point has already been referred to.

But it is certainly fair to conclude that the court did not intend to go beyond the earlier cases in affirming the constitutionality of the law in any particular not before the court, unless such intention can be shown from its positive expression.

§ 880. On examining the cases thus referred to by the court, it will be found that in *Glen v. Hodges* there was no certificate given by any public officer, either State magistrate or judge of a United States court, nor was the slave even committed or arrested by any such officer to answer to the claim of the owner. Nor was there any such certificate, commitment, or arrest in *Commonwealth v. Griffith*. The claimant in that case, if he intended to apply for a certificate under the Act, proposed to bring the slave before a judge of the United States Court.

In *Wright v. Deacon*, a certificate had been issued by Judge Armstrong, of the Common Pleas Court of Philadelphia. In *Jack v. Martin*, the Recorder of the City of New York had granted a certificate, and Judge Nelson regarded the slave as being in custody under it. But in the view of the case taken by the Court for the Correction of Errors, the validity of a custody under a certificate so granted was not inquired into.

The question then is, could the Judge of the Common Pleas

<sup>1</sup> *Ante*, p. 473.

of Philadelphia and the Recorder of the City of New York have granted the certificate in these cases *in virtue of power derived from the State?* and may not the court, in Prigg's case, have regarded them as having acted in virtue of *that power?*

§ 881. In the former part of this work it has been shown that the national law may always be applied concurrently by the judicial power of the States, or, if not in all cases, certainly in those wherein the rights and obligations involved are such as were originally determinable by the authority of the States severally; provided the application of the law has not by Congress been made exclusive in the national judiciary.<sup>1</sup> There was no such limitation in these cases.

By the fourth construction of the provision (which has herein been presented as the true one) it, of itself, maintains the right and obligation in a relation between private persons, and the claim gives rise to a case within the judicial power.<sup>2</sup> It has already been urged that one or more members of the court, in Prigg's case, may have adopted this construction.<sup>3</sup>

By the third construction (supposed to have been adopted by the majority of the court, in Prigg's case), the claim is on the national Government, and (according to Judge Story's view<sup>4</sup>) gives rise to a case within the national judicial power. Such a claim certainly would not have been within the original jurisdiction of any State before that Government existed.

But whatever construction may be the true basis of legislation, the claim, when made under the Act of Congress, is the same as that which would have been made under private international law; the alleged fugitive defends, or denies the claim, and neither the national Government nor the State appears as a party.

It cannot be doubted that such a claim of a master for the person of the fugitive from service was a matter for legal decision originally determinable by the juridical power of each State.

§ 882. But it has been shown that the judicial power of the State can be thus concurrently exercised only by State officers

<sup>1</sup>303. <sup>2</sup>*Ante*, pp. 582-584. <sup>3</sup>*Ante*, p. 492. <sup>4</sup>*Ante*, p. 480.



directly authorized by special legislation, or by those who are judges of courts of ordinary common-law jurisdiction.<sup>1</sup>

Could the judge of the Common Pleas of Philadelphia, and the Recorder of the city of New York, thus exercise the judicial power of their respective States?

The jurisdiction of the Common Pleas of the city of Philadelphia, under later statutes, seems to have been questionable in cases after *Wright v. Deacon* (1819), but it seems that, at the date of that case, that court was regarded as having ordinary common-law jurisdiction.<sup>2</sup>

The court of the Recorder of the city of New York was one of special criminal jurisdiction, but the Recorder, at the date of *Jack v. Martin*, was also, under the charters of the city and statute modifications, one of the judges of the Court of Common Pleas for the city of New York, a court of ordinary or common-law jurisdiction succeeding to the older Mayor's Court, also a court of the same jurisdiction.<sup>3</sup>

The Recorder was also, by statute, empowered to exercise the powers of a judge of the Supreme Court of the State at Chambers, and to issue the writ of habeas corpus;<sup>4</sup> and being so empowered, he was one of the officers authorized to issue the writ for the benefit of the claimant, and to decide the question in the manner provided by the State statute.<sup>5</sup>

If the legislation of the States of Pennsylvania and New York, in respect to the delivery of slaves, was invalid by reason of the legislation of Congress on the same subject, it does not appear that judges of courts of ordinary common-law jurisdiction would have thereby been incapacitated from the exer-

<sup>1</sup> *Ante*, Vol. I., p. 500.

<sup>2</sup> *Palmer v. Commonwealth*, 6 S. and R. 246; *Kline v. Wood*, 9 *ibid.* 296; *Hoop v. Crowley*, 12 *ibid.* 220, note; also, compare *Dunlop's Laws of Pa.* (1836), c. 416, §§ 18, 20.

<sup>3</sup> Judge Daly's Hist. Essay, 47, 73, 78, in 1 E. D. Smith's Reports of N. Y. C. P.; Sess. Laws, 1821, p. 64, §§ 2, 11; R. S., Part III., t. 5, c. 1, § 1; Davies' Laws relating to the City, 154, 157, 184; Laws of the City, ed. 1833, 122, 123, note; *Murray v. Fitzpatrick*, 3 Caines, 38. That Common Pleas Courts in N. Y. (at least before 1846, see *Frees v. Ford*, 2 Selden, 178) were of ordinary common-law jurisdiction, see *Foot and Beebe v. Stevens*, 17 Wend. 483. *Hart v. Seixas*, 21 Wend. 48; though of inferior jurisdiction, *People v. Justices of Delaware*, 1 Johns. C. 181; and had no jurisdiction of writ of right, *People v. N. Y. Com. Pleas*, 4 Wend. 215. Compare question of jurisdiction of N. Jersey Com. Pl., in *Kempe's Lessee v. Kennedy*, 5 Cranch, 179, 185; S. C., 1 Peters' C. C. R. 37.

<sup>4</sup> R. S., Part III., ch. 3, t. 2, § 32.

<sup>5</sup> R. S., Part III., ch. 9, t. 1, § 6 and § 25, *ante*, p. 57.

cise of the concurrent judicial power of the State, if there was nothing in the State law to forbid them.<sup>1</sup>

§ 883. It may be objected to the foregoing argument that the courts have affirmed an Act of Congress necessary to make the claimant's custody of his recaptured slave lawful in States other than that in which the delivery should take place,—States through which it should be necessary for them to pass in returning to the State from which the fugitive had escaped;<sup>2</sup> that, hence, when these courts affirm the competency of a State magistrate to give a certificate sufficient for this end, they attribute to his decision an authority which the judicial power of his own State could not give; for a custody resting on State authority would be valid only within the State.

But the answer is, in the first place, that no custody under a certificate so given by a State magistrate has ever in any actual case been so maintained in passing through another State, being a *free* State, so called. There is no reported instance in which it has become the subject of judicial inquiry—how far the custody would be valid under such circumstances or preclude a renewed inquiry into the claimant's right. In the greater number of cases the question could not have been made, because, usually, the State in which the fugitive was found and delivered up was contiguous to that from which he escaped, and in other instances the return might have been by sea. Of the cases referred to in *Prigg's case*, *Jack v. Martin* is the only one where free States intervened geographically between the State wherein the fugitive was found and that from whence he escaped. There is nothing to show that the slave was actually carried back to Louisiana. He might have been carried by sea; and if transported through other free States, there is nothing to show what force was attached to the certificate given by the Recorder.

But besides—even though it should have been decided that a delivery by a State magistrate according to the Act of Con-

<sup>1</sup> By sec. 9 of the law of Pennsylvania, 1825-6 (*ante*, p. 71), aldermen and justices of the peace were forbidden to act under the law of Congress; and by sec. 14 of the law of New York, 1828 (*ante*, p. 57), such magistrates were forbidden to grant any warrant or certificate in these cases. In this legislation there seems to be a recognition of a competency in courts of ordinary jurisdiction independently of the powers specially conferred on them by these State statutes.

<sup>2</sup> See opinions noted, *ante*, p. 595, n.



gress would establish a right in the claimant to hold such fugitive, while thus *in transitu*, as under a law having a national effect or extent—it does not follow that the act of the State magistrate in deciding on such a claim and making such delivery, though performed according to the national law, is an exercise of a function politically derived from the United States. A right and obligation established by a law of national extent may constitute a valid legal relation between the persons affected by it, wherever the law extends, though the judicial determination of the existence of that relation should be made by an officer having a limited territorial jurisdiction. The Act provided for the recognition of the certificate, and the Constitution had declared that “full faith and credit shall be given in every other State to the acts, records, and judicial proceedings of every other State, and that Congress may, by general laws, prescribe the manner in which such acts, records, and proceedings shall be proved, and the effect thereof.”<sup>1</sup> The validity, in other intervening States, of a custody over the fugitive under the decision of a judicial officer of the State in which he may have been found, is not inconsistent with the idea that the decision was made in the exercise of power derived from the State.

§ 884. Again, it may be urged in objection, that while the national law may be applied by the concurrent judicial power of the State, yet it can be so applied only in remedial forms which are sanctioned by the common-law usage of the State; that this was hereinbefore admitted, when it was argued that the claim of the owner might be enforced by the State courts independently of any legislation;<sup>2</sup> that new remedial forms, created by a law of Congress, cannot thus be applied by the judicial power of the State, even though the substantive rights and obligations intended to be guarded by that law might be maintained by that judicial power applying forms known to the common law of the State.

<sup>1</sup> It will be seen that this giving credit and effect to the judgment of a tribunal of the forum having actual jurisdiction of the parties is very different from that giving operation and effect to the criminal law of the State from which a fugitive from justice had escaped, which was involved in Judge Taney's justification of the legislation of Congress in *Kentucky v. Dennison*, *ante*, §§ 818–820.

<sup>2</sup> *Ante*, §§ 827, 828.

Even if no authorities can be cited in support of such a distinction, it seems to be theoretically consistent.

§ 885. But it does not appear that the judges in Prigg's case noticed any such objection as disqualifying these *State magistrates* of whom they spoke from acting in virtue of the concurrent judicial power of the State. And, in the present inquiry, the point is not so much whether the action of a State judicial officer can consistently be justified as an exercise of power derived from the State, as it is whether *the courts* in the Pennsylvania and New York cases and *the Supreme Court* in Prigg's case regarded the action of the State magistrates of whom they spoke as the exercise of power derived from the State.

It does not appear that the question of the source of the power exercised by the State magistrate was examined in the Pennsylvania or in the New York case.

In the language of several of the justices, there are indications that in Prigg's case reference was had to the exercise of the judicial function by the "State magistrates." Judge McLean said, 16 Peters, 664:—"Congress can no more regulate the jurisdiction of the State *tribunals* than a State can define the *judicial power* of the United States" (*ante*, p. 635), and, *ib.*, 667, "The claimant is required to take him before a judicial officer of the State; and it is before such officer his claim is to be made;" and, *ib.*, 671, "A remedy sanctioned by judicial authority."<sup>1</sup>

<sup>1</sup> See pages 667-671, cited in full, *ante*, pp. 556-558. The importance of Mr. Meredith's argument in the interpretation of the Opinion delivered by Judge Story has been noticed, *ante*, p. 468, n. 3. Mr. Meredith, 16 Peters, 568, repeatedly spoke of the action of the judges and State magistrates as an exercise of judicial power. "The judiciary act of 1789 does not cover the whole judicial power under the Constitution. Subsequent legislation has supplied many omissions in that act, of which the act of 1793 is an instance, vesting in the Circuit and District Courts that portion of the judicial power which is embraced by the second and third sections of the fourth article of the Constitution.

"It is true that the act does not prescribe a judicial proceeding according to the forms of the common law. But, in the same case of *Martin v. Hunter*, this Court has said that, in vesting the judicial power, Congress may parcel it out in any mode and form in which it is capable of being exercised. The act contemplates a summary proceeding, but still of a judicial character. It provides for the preliminary examination of a fact, for the purpose of authorizing a delivery and removal to the jurisdiction most proper for the final adjudication of that fact; to the State on the laws of which the claim to service depends. But this examination is judicial in its character. The parties,—claimant and alleged fugitives,—are



Judge McLean, indeed, held that the power in respect to fugitives from justice and from labor "is admitted or proved to be exclusively in the federal Government." But, admitting that the power of *legislation* on this subject is exclusive in the federal Government, still, on general principles, the *judicial* power of the several States may be concurrently exercised in applying the national law to persons within the territorial jurisdiction of the State, unless Congress has chosen to declare the national judicial power exclusive in the application of the law. This point has been fully considered in a former chapter of this work.<sup>1</sup>

It would seem that a judge cannot refuse to exercise his judicial power in a case which properly may have come within his jurisdiction. If, in Prigg's case, the court held that these "State magistrates" might refuse to act as authorized by the law of Congress,<sup>2</sup> it might be inferred that they could not have regarded their action in these instances as an exercise of *judicial* power, but must have distinguished it as some special power, or one which was "personal" and not "official."

But if they took this view of the power in the hands of these "State magistrates," they must have also regarded it as a special power, a personal and not official power, in the hands of the judges of the United States District and Circuit Courts, and have held that these judges were likewise not bound to act unless they should choose.<sup>3</sup> But in none of the Opinions is there any intimation to this effect.

Besides, it has often been held that State judges are not bound to exercise the concurrent judicial power of the State to apply a law of Congress.<sup>4</sup> The judges, in Prigg's case, who held that the State magistrates were not bound to act under

brought within the jurisdiction; the case is to be heard and decided upon proof; the certificate is not to be granted, unless the judge shall be satisfied upon evidence that the party is a fugitive owing service to the claimant. He acts, therefore, in a judicial character, and exercises judicial functions."

In the words italicised there is a grave misstatement of the nature of the proceeding; but it only makes more apparent the judicial quality of the proceeding when viewed in its true light. See *post*.

<sup>1</sup> *Ante*, §§ 456, 457.

<sup>2</sup> See Story, Taney, and McLean, as quoted *ante*, in § 870.

<sup>3</sup> See opinions in the notes to 2 Dallas, 410.

<sup>4</sup> See Judge Woodbury in *The British Prisoners*, 1 Wood. and Minot, 170, and cases there noted, and *ante*, Vol. I., p. 496, note 2.

the law of 1793, may have based their opinion on that doctrine.

Some of the justices, in Prigg's case, referred to general acquiescence in the constitutionality of the law relating to fugitives from justice as an argument in favor of the power of Congress to legislate in respect to fugitives from labor. But no one of them argued that a recognition of the action of the Governors of States, following the law of Congress, necessarily involved the recognition of the action of these State magistrates. Their recognition of the action of the Governors of States (who certainly could not act in virtue of concurrent judicial power) does not imply that they did not regard the action of these State magistrates as an exercise of that power. They may have regarded the Governors as using the executive power of the State, and the State magistrates as using the judicial power of the State.<sup>1</sup>

On the whole, it appears that while the constitutionality of the Act in "conferring" power on "State magistrates" was not, in the opinion of the court, "free from reasonable doubt and difficulty," the majority of the judges intended to justify the custody and removal from the State of a fugitive from labor under the certificate of a State magistrate only when such State magistrate should be a judge holding the ordinary judicial power of his own State; and the Chief Justice may have intended to sanction only *the arrest* under the authority of the State magistrate, not the final hearing and giving a certificate.

§ 886. It appears then that, in the decisions under the law of 1793, the action of public officers therein mentioned, in making the delivery on claim as thereby contemplated, is justified only so far as such officers may be capable of acting in virtue either of *the judicial power of the United States, or the concurrent judicial power of the State.*

The question of the quality of the power exercised under the Act of 1793 will not here be examined by reasoning independently of these decisions, because the same question arises under the Act of 1850 in reference to the action of the commissioners, and because the decisions under that law which are

<sup>1</sup> *Ante*, § 848.



now to be considered are also authorities on the general question which arises under either law.

§ 887. The earliest case in which judicial opinion was expressed in regard to the constitutionality of the Act of 1850 is that of Sims, who, in April, 1851, in the city of Boston, was arrested on a warrant issued by George T. Curtis, Esq., United States commissioner, who after hearing the owner's claim, committed Sims to the custody of the United States marshal, preparatory to his removal from the State under the commissioner's certificate. Various proceedings were then had in his behalf to remove him from this custody, which are detailed in IV. *Monthly Law Reporter*, pp. 1-16. Of these several proceedings, there were two which elicited judicial opinion in respect to the constitutionality of the Act of 1850. The first of these was a petition of Sims, to the Supreme Judicial Court of Massachusetts, for a habeas corpus and to be discharged from the custody of the marshal.

The Opinion of the court in giving a unanimous decision affirming the validity of the marshal's custody was delivered by the Chief Justice, the late Lemuel Shaw. As was to be expected from the great respect previously accorded to the opinions of that distinguished judge as well as to the decisions of the court—a court second to that of no other State in judicial eminence—the decision has since been regarded of the highest authority,—to that degree that, in the opinions of judges who in later cases have maintained the action of a commissioner in like circumstances, it has been taken to preclude all further juristical discussion. In this Opinion, after examining certain questions of the practice in writs of habeas corpus, Judge Shaw says, 7 Cushing, 294:—"It is now argued that the whole proceeding, as it appears upon the warrant and return, is unconstitutional and void, because, although the Act of Congress of 1850 has provided for and directed this course of proceeding, yet that the statute itself is void, because Congress had no power, by the Constitution of the United States, to pass such a law and confer such an authority. The ground of argument leading to this conclusion is, that it is not competent for Congress, under the power of legislation vested in them by the

Constitution, to confer any authority, in its nature judicial, upon any persons, magistrates, or boards, other than organized courts of justice, held by judges, appointed as such, and to hold their offices during good behavior, and paid by fixed salaries; whereas the commissioners designated by the law in question do not hold their offices during good behavior, nor are they paid by fixed salaries. This is the argument."<sup>1</sup>

He then considers the occasion and nature of the constitutional provision and the purpose of the Act of Congress. From this portion of the Opinion extracts bearing on the questions of construction and of the power of Congress have been cited (*ante*, pp. 497-500). The residue of the Opinion relates principally to the question of the validity of the action of the United States commissioners. Judge Shaw says, on this point, 7 Cushing, 302:—"By the Act of 1793, the authority of issuing a warrant to arrest a fugitive from labor, of inquiry into the fact both of owing labor and of having escaped, and of granting a certificate, is conferred on justices of peace appointed for a term of years, and without salary, by the State government, or on the magistrates of cities and towns corporate. It is very manifest, therefore, that these powers were not deemed judicial, by the Congress of 1793, in the sense in which it is now insisted that the commissioner, before whom the petitioner has been brought, is in the exercise of judicial powers not warranted by the Constitution, because not commissioned as a judge, and holding his office during good behavior. Indeed it is difficult, by general terms, to draw a precise line of distinction between judicial powers and those not judicial. It is easy to designate the broad line, but not easy, the minute shades of difference between them. Those officers who hold courts and have civil and criminal jurisdiction, beyond doubt, exercise judicial powers. But there are, under every government, functions to be exercised, partly judicial and partly administrative, which yet require skill and experience, judgment, and even legal and judicial discrimination, which it is more difficult to classify. So under our own

<sup>1</sup> The point was urged before the commissioner and before the court by the counsel, Mr. R. Rantoul, Jr. See IV. Mon. L. R. 4; 7 Cush. 287.



government, in the Constitution of which a similar provision is found, requiring all judicial officers, excepting justices of the peace, to be commissioned and hold their offices during good behavior, we find many such cases. Such are bank commissioners, county commissioners, sheriffs, when presiding over and instructing juries empaneled to assess road-damages and damages for flowing land; commissioners of insolvency on the estates of deceased persons, and living insolvent debtors, masters in chancery, and many others.

"Now, as far as we understand it, commissioners of the Circuit Court of the United States are officers exercising functions very similar to those of justices of peace under the laws of the Commonwealth. They are commonly appointed from among counsellors-at-law, and of some standing, and well reputed for professional skill and experience. Their duty is, to inquire into violations of the laws of the United States, to hear complaints, issue warrants, hold examinations, and bind over or commit persons for trial for offences. These are functions requiring considerable skill and experience in the administration of justice, and it is just to presume that they are duly qualified to perform their duties. "Would it not be competent for Congress, under the powers vested in the general government, to provide by law for the appointment of justices of the peace, in each district, to be vested with powers under the laws of the United States analogous to those exercised under State laws, by justices of peace under the State government, without commissioning them as judges during good behavior, and giving them fixed salaries?

"At the same time it may be proper to say, that if this argument, drawn from the Constitution of the United States, were now first applied to the law of 1793, deriving no sanction from contemporaneous construction, judicial precedent, and the acquiescence of the general and State governments, the argument from the limitation of judicial power would be entitled to very grave consideration.

"But we are not entitled to consider this a new question, we must consider it settled and determined by authorities which it would be a dereliction of official duty and a disregard of judicial responsibility to overlook.

"We have already referred to the great weight to be given, in the exposition of statutes, to what may be regarded as contemporaneous construction; and this construction is of the more importance when the question turns upon the constitutionality of a legal enactment, made soon after the adoption of such Constitution, and for the avowed purpose not only of conforming strictly to the powers given by the Constitution, but of carrying out the very objects and purposes contemplated by it. To this is now to be added an acquiescence both of the State and general governments, of their representatives and people, for nearly sixty years, and a series of judicial decisions by the highest courts of our own and of the other States; and also of the Supreme Court of the United States, whose authority upon controverted questions, within their jurisdiction, and declared by their judgments, is binding upon the judges of State courts."

Judge Shaw then cites certain cases under the law of 1793, as if he considered them authorities on this question of the exercise of judicial power by the commissioners. The cases thus cited are *Commonwealth v. Griffith*, 2 Pick. 11; *Wright v. Deacon*, 5 Serg. and Rawle, 62; *Jack v. Martin*, 12 Wend. 311; *Hill v. Low*, 4 Wash. C. C. R. 329, and *Prigg's* case.

It is not material to notice anything in Judge Shaw's statement of the earlier cases except this—that he does not attempt to distinguish their several bearing on the different questions which were involved in the case then before him. As has been shown, they differ very materially in this respect.<sup>1</sup>

It is, however, necessary to examine critically Judge Shaw's statement of the bearing of the opinions of the judges of the Supreme Court, in *Prigg's* case, upon the question which is considered in this chapter.

Judge Shaw, 7 Cushing, 306, says:—"There was some difference of opinion among the judges upon minor points, but none, it is believed, upon the subject now under consideration, the constitutionality and binding force of the Act of Congress

<sup>1</sup> Compare the summary, *ante*, pp. 630, 631 and notes.



of 1793, and especially that part of it which confers an authority on circuit and district judges, and on county and city magistrates, to take a summary jurisdiction in the manner provided by the Act of 1793. Some of the majority were of opinion that Congress could not, by its own enactments, require State officers, such as magistrates of counties, cities, and towns corporate, to take upon themselves the duty of exercising such jurisdiction; but they conceded that the law conferred a sufficient authority on them to act, if they should think fit to do so, voluntarily, and if they were not restrained by State legislation. On the other hand, Mr. Justice McLean, agreeing to the general rule, as to State officers, was of opinion that, under the peculiar circumstances, Congress had the power to enforce this duty upon magistrates, and that they were not at liberty to decline it, but were legally bound to execute it."

On comparison of this citation with the analysis which has already been given of the Opinions of the several justices in that case, it may be questioned whether Judge Shaw was warranted in making such a statement of the bearing of the opinions in Prigg's case upon this point. So far as any *State officers* are in those Opinions spoken of as capable of acting as provided by the Act of 1793, they are called *State magistrates*; in no instance is it said that *county and city magistrates*, or *State officers, such as magistrates of counties, cities, and towns corporate*, might take upon themselves the duty of exercising such jurisdiction.

For reasons already stated, it is herein maintained that, whoever may have been the persons designated in the Act of Congress, there is no warrant for saying that the Supreme Court of the United States, in Prigg's case, intended to justify the action of any State magistrates other than such as were capable of acting in virtue of the judicial power of the State.<sup>1</sup>

After a further statement of differences of opinion in Prigg's case, Judge Shaw says, 7 Cush. 308:—"We have thought it important thus to inquire into the validity and constitutionality of the Act of 1793, because it appears to be decisive of that in question. In the only particular in which

<sup>1</sup> *Ante*, p. 652.

the constitutionality of the Act of Congress of 1850 is now called in question, that of 1793 was obnoxious to the same objection, viz., that of authorizing a summary proceeding before officers and magistrates not qualified under the Constitution to exercise the judicial powers of the general government. Congress may have thought it necessary to change the pre-existing law, not in principle but in detail, because, as we have seen in the case of *Prigg v. Pennsylvania*, some of the judges were of opinion that State magistrates could not act under the authority conferred on them by the Act of 1793, when prohibited from doing so by the laws of their own State, and some States had in fact passed such prohibitory laws. The present fugitive-slave law may vary in other respects, and provide other and more rigorous means for carrying its provisions into effect, but these are not made grounds of objection to its constitutionality."

As further indicating the reliance placed, on this occasion, on the position that the question had been decided by the cases under the law of 1793, the following passages from the conclusion of the Opinion are important:—

"On the whole, we consider that the question raised by the petition, and discussed in the argument before us, is settled by a course of legal decisions which we are bound to respect, and which we regard as binding and conclusive upon this court.

\* \* \* \* \*

"The principle of adhering to judicial precedent, especially that of the Supreme Court of the United States in a case depending upon the Constitution and laws of the United States, and thus placed within their special and final jurisdiction, is absolutely necessary to the peace, union, and harmonious action of the State and general governments. The preservation of both, with their full and entire powers, each in its proper sphere, was regarded by the framers of the Constitution, and has ever since been regarded, as essential to the peace, order, and prosperity of all the United States.

"If this were a new question, now for the first time presented, we should desire to pause and take time for consideration. But though this Act, the construction of which is now drawn in



question, is recent, and this point, in the form in which it is now stated, is new, yet the solution of the question depends upon reasons and judicial decisions, upon legal principles and a long course of practice, which are familiar, and which have often been the subject of discussion and deliberation.

"Considering, therefore, the nature of the subject, the urgent necessity for a speedy and prompt decision, we have not thought it expedient to delay the judgment. I have, therefore, to state, in behalf of the court, under the weighty responsibility which rests upon us, and as the unanimous opinion of the court, that the writ of *habeas corpus* prayed for cannot be granted."

§ 888. Subsequently to this decision of the Supreme Judicial Court of the State, another application for *habeas corpus* was made to Judge Sprague, of the United States District Court, on the "ground that the law was unconstitutional, particularly in giving jurisdiction to commissioners." IV. Mon. L. R. 10. "After a full hearing, the judge gave his Opinion, sustaining the constitutionality of the law, and the writ was refused." (Ib.) No written Opinion appears to have been published.<sup>1</sup>

<sup>1</sup> Application was also made to Judge Woodbury, the United States Circuit Judge, for a writ, but on grounds having no connection with the circumstance that Sims was claimed as a slave. IV. Mon. L. R. 13.

On the 7th of April, 1851, Judge Nelson, as U. S. Circuit judge, considered very fully the constitutionality of the law of 1850, in a charge to the grand jury of the Southern District of New York, which is given in 1 Blatchford's R. App., from which the following passage, ib. 643, is taken:—"It has been made a question upon this Act, whether or not it was competent for Congress to confer the power upon the United States commissioners to carry it into execution. As the judicial power of the Union is vested in the Supreme Court, and such inferior courts as Congress may from time to time establish, the judges of which shall hold their offices during good behavior, it has been supposed that the power to execute the law must be conferred upon these courts, or upon judges possessing this tenure. It is a sufficient answer to this suggestion, that the same power was conferred upon the State magistrates under the Act of 1793, and which, in the case of *Prigg v. The Commonwealth of Pennsylvania*, was held to be constitutional by the only tribunal competent, under the Constitution, to decide that question. No doubt was entertained by any of the judges in that case but that these magistrates had power to act, if not forbidden by the State authorities. The judicial power mentioned in the Constitution, and vested in the court ordained and established by and under the Constitution in the strict and appropriate sense of that term:—courts that comprise one of the three great departments of the government, prescribed by the fundamental law, the same as the other two—the legislative and the executive. But, besides this mass of judicial power belonging to the established courts of a government, there is no inconsiderable portion of power,

§ 889. On the trial, in May or June of the same year, in the United States District Court for the District of Massachusetts, of James Scott, accused of the rescue of the slave Shadrach while held, under a commissioner's warrant, for hearing the claim. Judge Sprague examined the constitutionality of the law of 1850, as appears from newspaper reports and from the notice given in IV. Mon. L. R. 159. In the words of the last:—"He considered the objections to the Act of 1850, and showed that they applied with equal or greater force to the Act of 1793." He also referred to the long period during which the earlier Act had been unquestioned. Judge Sprague referred particularly to certain cases under that Act, as instances in which the action of a *State magistrate* had been sanctioned, viz.: *Wright v. Deacon*, Commonwealth v. Griffith, and *Jack v. Martin*; and also, *Ex parte Simmons*, 4 Wash. 396; *Hill v. Low*, ib. 327; *Worthington v. Preston*, ib. 461. He also referred to *Johnson v. Tompkins*, and *Jones v. Van Zandt*, as sustaining, generally, the validity of that law. He next gave Story's language in Prigg's case, 16 Peters, p. 622, and McLean's Opinion in the same case. Judge Sprague also attributed great weight to the decision of the Supreme Court of Massachusetts in *Sims' case*, and to the Opinions of Judge Shaw and Mr. Commissioner Curtis. Then, alluding to the fact that,

in its nature judicial—*quasi-judicial*—invested, from time to time, by legislative authority, in individuals, separately or collectively, for a particular purpose and limited time. This distinction, in respect to judicial power, will be found running through the administration of all governments, and has been acted upon in this since its foundation. A familiar case occurs in the institution of commissioners for settling land claims, and other claims against the government (2 St. at large, 324-440). A strong illustration will be found in this State under the old constitution of 1777. By that, justices of the peace were appointed by the council of appointment, and held their offices during the pleasure of that body. Yet the powers possessed by most magistrates were conferred by acts of the Legislature upon the aldermen of cities, who were elected by the people. But I need not pursue the subject, as the question must be regarded as settled by the case referred to."

In this argument, the *quality* of the power is determined by the capacity or incapacity of the officer to exercise it. Judge Nelson appears to have been sensible of no inconsistency in saying, ib. 640:—"Not a power has been conferred upon those appointed to administer it judicially," &c., and arguing in the same place that a commissioner's decision precludes the interference of the State judicial authority, because the Constitution of the United States provides that the judicial power of the United States shall be vested thus and so; and ib. 642, arguing as if the decision of a commissioner were on a par with a decision of a United States court.



since the decision of Prigg's case, Justices Grier, Nelson, and Woodbury had become members of the Supreme Court of the United States, he referred to the expressed determination of Judge Grier at Philadelphia, in October, 1850, in the case of one Garnett, to enforce the Act of that year, and his recognition, in a private letter, of its constitutionality,<sup>1</sup> and to the charge of Judge Nelson, in the month of March, 1851, and stated that Judge Woodbury had expressed his concurrence in the same views.<sup>2</sup> Judge Sprague then said, IV. Mo. L. R. 160:—"We have thus not only the decision of the highest judicial tribunal in the United States, which alone would be conclusive upon all subordinate courts, but the opinions of all the members of the court in 1842, and all its present members, in support of the constitutionality of the Act. Against all this, not one decision of any court, State or national, and not one opinion of any judge of the United States, can be produced.

"These questions must now be considered as settled by contemporaneous exposition, by practice and acquiescence for more than fifty years, by the opinions and decisions of courts and judges, State and national, and especially by the Supreme Court of the United States. To overturn the construction of

<sup>1</sup> In 2 Wallace, Jr., 134, in the statement preceding the charge of Judge Kane, April, 1851, to the Grand Jury, on the law of treason, the reporter says:—"On the 18th Sept., 1850, Congress, in order to give effect to a provision of the Constitution, passed a law to enable the owners of fugitive slaves to recover them when found in the States to which they had fled. Slavery, the abolition of slavery, this law, or any law for the recovery of slaves, had been, for some time prior to the passage of the Act, the themes of passionate and fanatical debate by extreme factions in the Northern and Southern States. The country was convulsed by party rage, and that 'unity of government which constitutes us one people' had itself become endangered. Not content with resisting the passage of the Act, the northern part of the faction, immediately after its passage, set themselves to work through the pulpits, the press, through public harangues and secret engines of every kind, to bring about resistance to the law and to destroy the power of executing it, through the force of public opposition." The introduction of such historical passages in a volume of *law reports*, is also some evidence of the prevailing excitement. The reporter adds:—"In this circuit, everywhere, owing to the energy of this court and the commissioners, and officers appointed by it to execute the provisions of the Act, the law was generally enforced with integrity. 'As the Lord liveth, and as my soul liveth'—declared Mr. Justice Grier, just after its passage, and in the midst of an assemblage whose murmurs of violence were disturbing his administration of justice—"this court will administer this law in its full meaning and genuine spirit until the last hour that it remains on the statute book." This was probably the occasion referred to by Judge Sprague, as Garnett's case.

<sup>2</sup> He had not done this in Sims' case; the question was not before him. I have not been able to find any record of Judge Woodbury having expressed such an opinion.

the Constitution so established, would be a most dangerous violation of principle and duty. If a court may do this, it may overturn established rules of property, of personal rights, and of evidence upon which the community have for a long time acted, and thus shake every man's title, put in jeopardy every man's liberty, and render the law so uncertain that no counsel could advise and no man act with safety."

§ 890. But while he considered every question in this case as settled by previous judicial decisions, Judge Sprague also discussed the question, "Do the proceedings prescribed by Congress for the delivery of fugitives from labor require the exercise of judicial power by a court, or may they be summary before a magistrate?" IV. Mo. L. R. 159. Meaning, probably—not, as might be inferred from such a statement of the question, that, if performed by a court they would be judicial, and if before a magistrate they would be summary—but are they in their nature an exercise of judicial power, such as, under the Constitution, must be vested in a court. In answering this, he observed (ib.):—"A proceeding, then, is not judicial merely because a magistrate or officer must ascertain facts and law, and act thereon in a particular case. As a general rule, to render the proceeding judicial under our jurisprudence, the tribunal must have the power to render a judicial judgment as to the questions at issue, which, if not annulled by appeal or reversal, will conclude the parties in future controversy upon the same question. The matter in controversy becomes, *res judicata*, judicially settled, and not open for future litigation between the same parties. It has been urged that this is not so, because, after judgment upon a writ of entry, the same question may again be litigated in a writ of right. This is a mistake. It is not the same question. The matters in issue in those two actions are quite different. The mere right is never in issue in a writ of entry. In a writ of entry on *disseizin* and a plea of *nul disseizin*, the only question is whether the defendant did disseize the plaintiff, and that being adjudged, cannot be again litigated. The mere right may be afterwards tried, because it is, legally, a different question."

<sup>1</sup> A very close parallel might be instituted between this pair of judgments, and the issues which may arise between the alleged fugitive and the claimant, viz.,



"In order, then, to determine whether the proceedings before a commissioner are judicial, let us see what is their result. He is to grant or withhold a certificate. What is the legal force of that certificate? It is merely an authority to carry the person named from one State to another. This is its whole legal effect. What may be legally done with that person in the State to which he is carried, depends upon the laws of that State, and not upon anything in the certificate. It is true that the certificate states that certain facts exist, that is, in the opinion of the commissioner. But those facts are not thereby judicially established, but may be controverted in any future proceedings between the same parties, and the certificate would not be even admissible in evidence. Neither party would be precluded from immediately contesting the same question in any other proceeding. If, for example, a suit for assault and battery and false imprisonment were brought in the Circuit Court against the claimant for the original arrest without a warrant,<sup>1</sup> and the justification set up was, that the plaintiff was a fugitive from labor, and were this question thus directly in issue, the certificate could not be given in evidence any more than the opinion of any other person.

"The remark made in the Opinion delivered in *Prigg v. Pennsylvania*, that a claim for a fugitive from labor was a case within the judicial power, was an *obiter dictum*, and can be reconciled with what was deliberately decided in the same case only by supposing that the judge who delivered the Opinion intended that Congress might legislate for it as within the judicial power, and provide for its being tried by a court, not that they must do so."<sup>2</sup>

§ 891. On the 17th of August, 1851, application was made to

that which arises under the provision, in the State where the claim is made, and that which may arise if the recovered fugitive claims freedom under the local law of the State to which he is taken. Legally, the matters in issue in these two actions, are quite different.

<sup>1</sup> Is this suit supposed to be in the State wherein the claim has been made and the certificate given? But is such a suit supposable, when the defendant may carry off the plaintiff out of the forum in which the suit is brought? Or does the judge suppose the suit to be brought by the plaintiff, as a citizen of another State, in the United States Court in the slave State to which he has been carried? Judge Sprague had not the lights afforded by *Dred Scott's* case!

<sup>2</sup> See *ante*, pp. 468, 540.

Judge Conckling, of the United States District Court for the Northern District of New York, for a habeas corpus on behalf of John Davis, in custody of a United States Deputy Marshal, acting under a warrant issued by H. K. Smith, United States Commissioner. "The application was denied by the judge for want of probable cause." IV. Monthly L. R. 302. The judge is reported (*ib.*) to have said:—"With regard to the Act, the judge said he did not consider himself at liberty to treat its constitutionality as any longer an open question. Nearly a year had elapsed since it received the sanction of the two houses of Congress, and, in accordance with the official opinion of the Attorney-General of the United States, the approval of the President. No act of the national government had ever more strongly arrested the attention of the American people, or been more closely scrutinized. It had been repeatedly brought under discussion and consideration before the judges and judicial tribunals of the country, both State and national, and in every instance its constitutionality had been unequivocally asserted and maintained. Among those by whom this opinion had either directly or indirectly been declared, are at least three of the judges of the Supreme Court of the United States, all of whom, moreover, are citizens of States in which slavery does not exist. Under these circumstances, Judge Conckling said it was, in his judgment, wholly unnecessary, and would be scarcely decorous, for him to enter upon the examination of the question at all. At an earlier period it would have been his duty to do so, and to be governed by his own independent conclusions; and this duty he should not for a moment have hesitated to perform." The motion for habeas corpus on the first petition was denied.

A certificate having been granted by the commissioner after hearing, a second application was made to Judge Conckling, on the 19th of August, who then discharged the prisoner, as a person not within the purview of the Act. (See his decision cited *ante*, p. 606.)

Judge Conckling, therefore, did not pronounce on the validity of a certificate in a case within the Act. But a portion of his Opinion is very important, as it bears on the question of



the judicial action of the commissioner. In this case, the objection against the action of the commissioner, as being an exercise of judicial power, seems not to have been made, and the counsel for the claimant relied upon the principle, "that when, by a court of competent jurisdiction, a judgment in its nature final has once been pronounced, it cannot be reviewed on habeas corpus" (relying chiefly on *Ex parte Watkins*, 3 Peters, 193). See IV. Monthly L. R. 306. Judge Conckling, *ib.*, 307, recognizing the principle, and referring to the language of the sixth section of the Act, which declares the conclusiveness of the certificate, said:—"Now, whatever ground for doubt, if any might have existed, independently of this enactment, concerning the legal force and effect of these certificates, it may, I think, be safely assumed that it was intended by Congress to place them, in this respect, substantially on the footing of judgments rendered by judicial tribunals in cases within their jurisdiction."<sup>1</sup>

§ 892. On the trial of Allen, the United States Deputy Marshal, at Syracuse, New York, June 21, 1852, under the law of the State, for kidnapping the slave Jerry, the *warrant* issued by a United States Commissioner, and the arrest and custody *under the warrant* were specially pleaded. The supposed fugitive had been rescued from the marshal's custody before the claim could be heard and a certificate given by any court or commissioner. Judge Marvin's charge sustained the lawfulness of the custody under the warrant (*ante*, p. 60, note). But, strictly speaking, the right of a claimant under such a certificate to remove from the State a person claimed as a fugitive, was not involved in the decision of the case before Judge Marvin.<sup>2</sup>

<sup>1</sup> In McQuerry's case (1853) 5 McLean, 469, *ante*, p. 501, Judge McLean said, *ib.* 481:—"The powers of the commissioner, or the amount of the penalties of the Act are not involved in this inquiry. If there be an unconstitutional provision in an Act, that does not affect any other part of the Act. But I by no means intimate that any part of the Act referred to is in conflict with the Constitution. I only say that the objections made to it do not belong to the case under consideration."

<sup>2</sup> But the judge thought it necessary to consider the validity of the entire proceeding before a commissioner as contemplated by the Act. His view of the character of the commissioner's action is given as follows:—"It is further objected that the office of the commissioner is a judicial office, and that he is to adjudicate the question whether the fugitive was held to service or labor; in other words, whether

Certain persons charged with rescuing Jerry were held to bail Oct. 21, 1852, in the Western District of New York, by Judge Conckling, who is reported in the *Syracuse Journal*, Oct. 22, to have said, "The proceeding on the part of both the commissioner and the deputy-marshal appear to have been entirely regular. The fugitive was therefore lawfully restrained of his liberty by due process of law."

The case *Henry v. Lowell and others*, 16 Barbour, 269 (argued April 3, 1853), was an action of trespass against the defendants for having assisted the marshal on the occasion above mentioned. The validity of the Act in all respects was affirmed as established by previous cases. By the Court, Gridley, J., "It is insisted in the printed points submitted by the plaintiff's counsel, that the Act of Congress known as the fugitive slave Act is unconstitutional and void, and therefore that the defendant cannot justify under it. It is not, however, explained in what respect or on what grounds the Act in question is in violation of the Constitution. The former Act (of 1793) was adjudged to be in harmony with the Constitution in the case of *Prigg* (16 Peters, 539), by the highest tribunal known to our law, and that decision has been reaffirmed in

he is a slave or a freeman. The statute has not been understood as creating a judicial officer or court. My attention is directed particularly to the sixth section of the Act. It contains many particulars, and its language is not very clear. It provides that the commissioner may take depositions or affidavits in writing, and he is to certify them, or he may receive other satisfactory testimony which has been *duly taken and certified* by a court, magistrate, justice of the peace, or other legal officer authorized to administer an oath and to take depositions under the laws of the State from whence the person owing service escaped. He may receive proof, also by *affidavit*, of the identity of the person, and that he owes service or labor of the person claiming him, and that the person escaped, and, upon such satisfactory testimony, he is to make out and deliver to the claimant a *certificate setting forth the substantial facts*, as to the service or labor due from such fugitive to the claimant, and of his escape, with authority to such claimant to take and remove the fugitive to the State from which he escaped. The commissioner receives the depositions or affidavits, or testimony duly taken in another State, and if they are such as the statute requires, and establish the particulars mentioned in the statute, the commissioner must give the certificate which sets forth the facts appearing before him, and certifies to the authority of the claimant or his agent to remove the fugitive. He pronounces no judgment, he decides nothing except that the *depositions, affidavits, and certified testimony* are according to the statute and satisfactory; and he certifies the facts, with authority to remove. A case for removal being made out, the certificate is given. The rights of the person claimed to freedom are not concluded by these proceedings, in the State to which he is taken. There he can have a trial by and under the laws of that State, and the proceedings before the commissioner cannot be used as a judicial determination of the fact that he is a slave."—Pamphlet Report, pp. 96, 97.



the 5th of Howard's R. 215 (Jones *v.* Van Zandt). No important distinction has been pointed out by the counsel between that Act and the law of 1850, and we do not perceive any bearing on the question of its constitutionality. In several cases that have occurred, the provisions of the present law have been drawn in question, and the Act has been declared constitutional by Justice Curtis and Justice Nelson<sup>1</sup> of the Supreme Court of the United States, and by other eminent judges before whom the question has been raised. This uniform current of authority may well excuse us from a discussion of the question upon principle."

§ 893. In Booth's case (1854), 3 Wisc. 1, the relator was held by the United States Marshal under a *mittimus* issued by a United States Commissioner, for violation of the law of 1850, in having unlawfully aided, &c., a person named Joshua Glover, the alleged fugitive slave, to escape from the custody of the United States Deputy-Marshall, who "had then and there arrested and taken into custody the said Joshua Glover, by virtue of a warrant issued by the *Judge* of the United States for the said district, pursuant to the provisions of the Act of Congress in that case made and provided, approved Sept. 18, 1850," &c. In this case, therefore, there was not even any custody under a *certificate* given by a judge, and there had been no action by a *commissioner* in respect to the delivery of the

<sup>1</sup> In referring to Judge Curtis as having sustained the validity of the Act, the court may have relied on his Opinion given as counsel for the U. S. Marshal (*ante*, p. 533), but more probably to his judicial action in the case *United States v. Morris* (Oct. 1851), in the Circuit Court for the first circuit, in which the defendant appears to have been indicted under the Act for a misdemeanor in the rescue of the slave Shadrach, while in custody under a commissioner's warrant. The question whether the jury could decide on the validity of the Act, was considered. Judge Curtis decided that they could not. The constitutionality of the law is not considered in the Opinions delivered by Judge Curtis on that occasion, which are reported in 1 Curtis, 23. The judge did, however, instruct the jury that so much of the Act of Congress as gave jurisdiction to commissioners, was constitutional. In certain charges to grand juries, given in App. to 2 Curtis, the subject of treason and resistance to the execution of the laws of the United States is presented. But the fugitive-slave law is not named. In citing Judge Nelson's authority, the reference undoubtedly is to the charge delivered in the southern district of New York, given in 1 Blatch, App. (*ante*, p. 659). Judge Nelson delivered, in the northern district, Oct. 21, 1852, another charge, given 2 Blatch, App. This has reference particularly to the offence of forcibly resisting the law. The judge's remarks are principally directed to the importance of the provision and the duty of fulfilling its obligations: speaking of it as a compact between the States.

alleged slave, so that the question of the validity of a custody under a commissioner's certificate was not strictly before the court. Judge Smith, who decided in the first instance on the petition of the relator, did not make any reference to the powers of commissioners. He, however, in 3 *Wisc.*, 37-40,<sup>1</sup> maintained that a judicial determination of the claim, as contrasted with any summary proceeding, is contemplated by the provision. He there observes:—

"Again, it is to my mind apparent, that the provision of the Constitution in regard to fugitives from labor or service, contemplates a judicial determination of the lawfulness of the *claim* which may be made.

"Mr. Butler, of South Carolina, who reported the clause for the first time, Aug. 29th, 1787, framed its conclusion as follows: 'but shall be delivered up to the person *JUSTLY* claiming their service or labor.' How was the *justice* of the claim to be ascertained? Who were to determine it? Fugitives were not to be discharged in consequence of any law or regulation of the States to which they may have fled. Not discharged by whom? The federal government? No, but by the States, in consequence, or by virtue of any law or regulation therein. 'But shall be delivered up.' By whom? Evidently by the same power which had covenanted not to discharge them. Shall be delivered up by the States, not *seized* by the federal government.

"The clause as finally adopted reads, 'but shall be delivered up on claim of the party *to whom such service or labor is DUE.*' Here is a fact to be ascertained, before the fugitive can be legally delivered up, viz.: that his service or labor is really due to the party who claims him. How is the fact to be ascertained? A claim is set up to the service of a *person*. He who makes the claim is denominated by the Constitution a party. The claimant is one party, the person who resists is another party. If he really owes the service according to the laws of the State from which he is alleged to have escaped,

<sup>1</sup> In a passage immediately following that which has been cited as bearing on the question of construction. (*Ante*, p. 512.) Indeed, the passage here cited bears also on that question.



and has in fact escaped, he must be delivered up. If the claim is unfounded, he cannot be delivered up. The Constitution itself has made up the issue, and arranged the parties to it. Can any proposition be plainer, than that here is suspended a legal right upon an issue of fact, which can only be determined by the constitutional judicial tribunals of the country? It bears no analogy to the extradition of fugitives from justice. In the latter case, no issue is presented by the Constitution. Judicial proceedings have already been commenced, and this is but a species of process to bring the defendant into court. No *claim* is to be determined. He is to be delivered up, from the mere fact that he is charged, to be removed to the State demanding him for trial. He is placed in the custody and under the protection of the law, in the regular course of judicial proceedings. But in the former case, there can be no delivery until the claim is tried and determined, and then the fugitive is delivered, not into the custody of the law, but into the possession and control of the party who has established his claim; not to be removed to another State or tribunal for trial, with the shield of the law over him, but to be reduced, without further process or trial, to absolute subjection, to be taken whithersoever the claimant may desire. In the one case, the proceedings are commenced and terminated where the claim is made; in the other, the suit is commenced where the offence is committed, and the law sends out its process to bring in the defendant to meet the charge. While that process is being served, through all its mutations, he is as much under the protection of the law as he who executes it, and, in its eye, both are equal.

"Here, then, is a fact, an issue, to be judicially determined before a right can be enforced. What authority shall determine it? Clearly the authority of the State whose duty it is to deliver up the fugitive when the fact is determined. Until the issue which the Constitution itself creates is decided, the *person* is entitled to the protection of the laws of the State. When the issue is determined against the fugitive, then the constitutional compact rises above the laws and regulations of the State, and to the former the latter must yield.

"To my mind this is very clear and simple. The whole proceeding is clearly a judicial one, and I will not stop here to demonstrate what, from the preceding remarks, appears so obvious. The law of 1850, by providing for a trial of the constitutional issue between the *parties* designated thereby, by officers not recognized by any constitution, State or national, is unconstitutional and void."

§ 894. Judge Smith proceeds, in a passage which will be cited in the next chapter, to consider the objection of want of a jury trial. The two questions are cognate, and in the Opinion of the full bench on the certiorari, they are discussed together by Chief Justice Whiton, so that it is not easy to separate the arguments. The Chief Justice examines particularly the question of the power of the commissioners in the passage here cited from 3 Wisc. 64-66.

"It becomes, therefore, our duty to decide whether so much of the Act of Congress of September 18th, 1850, as provides that certain officers, called commissioners, shall decide the questions of fact which must be proved before the surrender of the alleged fugitive can take place, is valid and obligatory. We think that we are also called upon to decide whether the proceedings provided for in the Act for establishing judicially the fact of the escape of the alleged fugitive, and the fact that he owes service or labor, are in conformity with the Constitution of the United States. These questions are most grave and important; we would that we could avoid them, but they are forced upon us, and we are not at liberty to refuse to consider them.

"We are of opinion that so much of the Act of Congress in question as refers to the commissioners for decision the questions of fact which are to be established by evidence before the alleged fugitive can be delivered up to the claimant, is repugnant to the Constitution of the United States, and therefore void for two reasons,—1st, because it attempts to confer upon those officers judicial powers; and 2d, because it is a denial of the right of the alleged fugitive to have those questions tried and decided by a jury which, we think, is given him by the Constitution of the United States. We have re-



ferred to the case of *Martin vs. Hunter's Lessee* (1 Wheaton p. 305), and to Art. 3, sec. 1, of the Constitution of the United States, to show that Congress can not vest any judicial power under the Constitution except in courts. We are aware that Congress has established courts in the various territories, and has provided for the appointment of judges with a different tenure of office from that fixed by the Constitution; but the power to appoint these judges is supposed to be derived from Art. 4, sec. 3, of the Constitution, which provides that 'Congress shall have power to dispose of, and make all needful rules and regulations respecting the territory or other property of the United States.'

"But, however this may be, we are not aware that the authority to vest any portion of the judicial power in any tribunals created by itself, except those mentioned in section 1 of Art. 3 of the Constitution, is claimed for Congress by any one, save in the single instance of judicial officers for the Territories belonging to the United States, and for the District of Columbia. We think that the duties performed by the commissioners under the Act in question are judicial in their character; as clearly so as those performed by a judge in the ordinary administration of justice. He is obliged to decide upon the questions presented, judicially, and to give a certificate to the person claiming the alleged fugitive, which authorizes his transportation to the State from whence he is alleged to have escaped, or withhold it, as he shall think proper, in view of the evidence submitted for his consideration. It is true that the Act, by providing that the record made in the State from whence the alleged fugitive may have escaped shall be conclusive evidence of the escape, and of the fact that the person claimed owes service or labor to the claimant, materially lessens the labor of the commissioner, but this does not alter the nature of the act which he performs; it must be regarded as a judicial determination of the matter submitted to him. We are therefore of opinion that the act under consideration, by attempting to vest judicial power in officers created by Congress and unknown to the Constitution, is repugnant to that instrument, and for that reason void."

§ 895. Judge Crawford, after referring to the objections made to the power exercised by the commissioners, and to the want of a jury trial, says (3 Wisc. 80):—"The force of argument which has been brought to bear, as well against as in favor of the constitutionality of the Act of 1850 in respect to these questions, has, I confess, raised doubts in my mind, but it has failed to produce that conviction which should justify a court or judge to pronounce a legal enactment void, because unconstitutional, and I am therefore unable to concur in the opinion that this law is unconstitutional.

"I shall briefly state my views upon these questions. \* \* \* To my mind, the granting of these certificates 'upon satisfactory proof being made,' looks very like the exercise of judicial functions, because, although the granting of the certificate is merely a ministerial act, yet the determination upon the sufficiency of the proof would seem to involve judicial power. And in this connection it is urged that Congress cannot confer judicial power otherwise than," &c. (stating the objection), "But the judges of several of the Territories of the United States, who hold their appointment from the President, are not appointed to hold during good behaviour; and, if I am not mistaken, there is no instance of their having been held liable to impeachment—at least that they are not so liable, has been advanced by an Attorney-General of the United States.

"It is said, territorial judges are appointed under the power given to Congress by the second clause of section three of Article four of the Constitution, on the ground that the establishment of a judiciary for the territories is a necessary incident to the acquisition of territory, and the power to make all useful rules and regulations for those territories; but if the power to legislate upon the subject of fugitives from labor be vested in Congress, it would seem that the performance of judicial acts might be vested in other than judges or courts, under the constitutional provision (article three, section one,) in such a case, as in the case of newly organized territories.

"But it has been repeatedly held, that where, by an act of Congress, State courts or magistrates are authorized to perform acts of a judicial character arising out of the acts of Congress, they may lawfully do so if not prohibited by the State law.



"Now, if judicial power can be conferred by Congress upon others than courts or judicial officers known to the Constitution, it seems to me that it can make little difference whether the power be vested in a State court, or officer, or in a commissioner or officer of the United States who is not a judicial officer. In either case the power is vested in a tribunal or officer, not a court or judge, contemplated by the clause of the Constitution referred to.

"But there certainly is a degree of force in the objection that the power to hear and determine complaints and summary applications, which may, and often do involve important rights of personal liberty, and require the exercise of much professional experience and wisdom, ought not to be vested in the class of officers who are known as commissioners of the federal courts, who hold their offices at the pleasure of the courts; and although in many instances gentlemen of acknowledged ability fill these offices, yet this of itself affords no complete answer to the objection."

Notwithstanding, then, Judge Crawford's dissent from the judgment of his associates,<sup>1</sup> his opinion indicates his belief that the commissioners do exercise the judicial power of the United States; and, if the view of the power exercised by *State magistrates* given in the former part of this chapter is correct, the only reason which he gives for holding that the power may be conferred on commissioners falls to the ground; for he assumes that the judicial power exercised by those magistrates was derived from Congress, whereas, in fact, it was derived from the State.<sup>2</sup>

§ 896. The language of Chief Justice Taney in *Ableman v. Booth*, 21 How. 526, affirming, in the name of the Supreme Court of the United States, the validity of all the provisions of the law of 1850, has already been cited.<sup>3</sup>

§ 897. In *Ex parte Robinson* (April, 1855), 6 McLean, 355, the prisoner was charged with having, under a commissioner's *warrant*, arrested, as a fugitive from labor, a girl who had been set at liberty by the State courts. There was no *certifi-*

<sup>1</sup> *Ante*, p. 504.

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<sup>2</sup> *Ante*, p. 652.

<sup>3</sup> *Ante*, p. 523.

cate whose validity could be in question. Judge McLean, discharging the prisoner, in his Opinion, *ib.* 359, says:—"The nature of the duties of the commissioners under the Act of 1850, is not in principle different from those which they previously discharged. The inquiry of a commissioner or judge under the fugitive Act is not strictly whether the person is free, but whether he owes service to the claimant. In its results, the inquiry may involve the liberty of the fugitive; but the principle applies to an apprentice as well as to a slave."

"It must be admitted that the inquiry is somewhat in the nature of judicial power; but the same remark applies to all the officers of the accounting departments of the government. They investigate claims and decide on the evidence. The examiners in the patent office determine the merits and novelty of inventions. This becomes a judicial duty in every suit between conflicting patents. It is impracticable, in carrying on the machinery of government, to prescribe precise limits to the exercise of executive and judicial power in deciding upon claims. The Supreme Court has had the acts of these commissioners before it, and has always treated them as having authority under the law."<sup>1</sup>

§ 898. In the case of Bushnell and Langston (1858), 9 Ohio, 77, the question of the validity of a certificate given by a commissioner could not have arisen under the facts. The indictments were for rescuing a supposed fugitive from those who had seized him without warrant, and also for rescuing from the marshal who had arrested him under a commissioner's *warrant*, to be brought before such commissioner (*ib.* 83, 89). The constitutionality of the law of 1850, in respect to the action of a commissioner, was not examined by Swan, Ch. Justice, who considered the only question to be whether

<sup>1</sup> This seems to have been a favorite distinction with Judge McLean. See citation from McQuerry's case, *ante* p. 571, note 2.

<sup>2</sup> Could Judge McLean have intended to say that the validity of a commissioner's action, under the law of 1850, had at this time been passed upon by the Supreme Court of the United States? To the parallel which is here drawn it may be answered that, until an inventor has got his patent, he has no legal right in his invention. The Judge ignores the manifest distinction between the inventor asking a patent from the Government, and the patentee claiming rights against private persons under the law of patent. As to the settlement of accounts with the Government, the remarks, *ante*, p. 622, will apply.



Congress had power to legislate at all on the subject.<sup>1</sup> Judge Peck, *ib.*, p. 215, held that "the question as to the legality of the acts of a commissioner" could not arise on the record of these cases.

Judge Brinkerhoff, *ib.*, p. 222, says:—"The Acts of Congress referred to, clearly attempt to confer on these commissioners the powers and functions of a court—to hear and determine questions of law and of fact, and to clothe their findings and determinations with that conclusive authority which belongs only to judicial action. And the issue of the warrant mentioned in the indictment was a judicial act."<sup>2</sup>

Judge Sutliff states the objection specifically, *ib.* 251, 252, and holds that the commissioner "is utterly incompetent, under the Constitution, to give final judgment of extradition from the State against any of her citizens, or any person residing within the State and entitled to the protection of her laws."

§ 899. The foregoing appear to be the only judicial decisions, or the principal decisions which, in supporting the constitutionality of the law of 1850, examine the question of the power of the United States commissioners under that law, or of the State magistrates under the law of 1793.

For reasons already stated, the opinions of gentlemen holding the office of commissioners cannot be placed on the same ground with judicial authorities.<sup>3</sup> Every commissioner who has entertained an application for a certificate under the law of 1850, has, of course, given the weight of his opinion in favor of the constitutionality of that Act. But the only cases in

<sup>1</sup> *Ante*, p. 523, 9 Oh. 185, Swan, C. J.:—"Neither the case before us, nor the question thus broadly presented, requires us to consider or determine the power of the court to appoint commissioners, or the provisions of the law of 1850, which have been the subject of discussion and condemnation, and which have so deeply agitated the public mind."

<sup>2</sup> In this last assertion, and in further asserting, p. 223, that this warrant was a nullity, Judge Brinkerhoff goes far beyond the ordinary limits of the objection. It is the granting of the final certificate authorizing a removal from the State, which is alone objected to, ordinarily, as an exercise of judicial power; not the issuing of a warrant to arrest, preparatory to a hearing.

<sup>3</sup> *Ante*, § 782. In the case of the fugitive John Bolding, delivered up in New York, August 1851, by Mr. Commissioner Nelson, the question of the constitutionality of the law was not raised nor the power contested. The ground of controversy has been noted in another place. (*Ante*, p. 407.)

which the question has been considered in a formal decision, such as could be reported, seem to have been that of Sims, before George T. Curtis, Esq., and of Burns, before Edward G. Loring, Esq.

§ 900. It has already been observed that Mr. Curtis, in this decision,<sup>1</sup> followed very closely the opinion delivered by Judge Story, in Prigg's case, and that construction of the provision according to which the claim is made on the national Government, which only makes "that surrender which *it* has stipulated to make." Mr. Curtis, like Judge Story, declares that there is "a case" under the Constitution "between the parties," which *case*, indeed, comes within the judicial power; but that

<sup>1</sup> *Ante*, p. 531, n. 2; IV. Mon. L. Rep. 6. "The commissioner, in giving his Opinion, admitted that a claim for a fugitive slave was a case between parties arising under the Constitution of the United States, and that it belonged to the judicial power of the United States, and maintained that, as it belonged to the judicial power of the United States, it was for Congress to decide in what mode, to what extent, and under what forms of proceeding that judicial power should be called into exercise, in order to give effect to the right of the owner claiming a fugitive slave. The question to be decided was, whether the form of procedure, authorized by the Act of Sept. 18, 1850, was such a form of exercising the judicial power as it was competent for the general government to employ.

"In all governments formed upon the English model, and having their executive, judicial, and legislative departments distinct, there is in the administration of the laws a certain class of inquiries, judicial in their nature, but which are confided to officers not constituting a part of the judiciary strictly so called.

"A master in chancery, in England, performs duties in their nature judicial, yet he has never been regarded as a judge. So a sheriff in England has a judicial capacity, and performs several judicial functions (1 Bl. Comm. 343), yet a sheriff is only appointed for a year, and receives no salary. In Massachusetts, the law has made it the duty of the sheriff, when presiding at trials by juries summoned to assess damages for laying out highways, to direct the jury on all questions of law arising at the trial. So auditors, commissioners in insolvency, and county commissioners, exercise a judicial power. The practice, then, in Massachusetts, shows that it is well understood that there are certain judicial functions having special objects which are and must be exercised by inferior officers, not appointed, commissioned, or qualified, as the Constitution of the State requires judges to be appointed, commissioned, and qualified. So under the laws of the United States, the same usage has prevailed. The commissioner of patents exercises judicial power. His decision upon claims of rival inventors involves the adjudication of matters of law and of fact, and moreover, is final as to a present right. No one has ever thought of complaining of the creation of this office as an improper mode of exercising the judicial power of the United States. Commissioners of the Circuit Court of the United States, were first appointed to take bail and affidavits in civil cases. Afterwards authority was given them to take depositions to be used in the courts of the United States. Nine years since their powers were further extended to enable them to arrest and imprison for trial, persons committing offences against the laws of the United States. During this period they have been in the constant exercise of a part of the judicial power of the United States. Their decision in such cases is final and conclusive for a special purpose, and settles a present right. It has never been intimated that they should have been first appointed by the President and commissioned for life."



the commissioner's or judge's action in this case is an act purely ancillary to the judicial. However, as according to his theory, the Government, which is one of the parties, is only doing by its agent, the commissioner or judge, what it has stipulated to do, and that for which, in the supposed "case," an appeal was to have been made to the judicial power, it is difficult to see how the judicial power has the case before it at all; or how the commissioner's action can be ancillary to something which is never to act at all. Either the parties have acted without reference to the judiciary, and there has been no "case," or the commissioner has acted for the judiciary throughout, in a case supposed to be within the judicial power.

§ 901. In the case of Anthony Burns, May 25, 1854, no application was made to any judicial tribunal, either State or national. Mr. Loring not only declared his action to be purely ministerial,<sup>1</sup> but also, with perfect consistency, stated plainly

<sup>1</sup> VII. Monthly L. R. 204. "The arrest of the fugitive is a ministerial, and not a judicial act, and the nature of the act is not altered by the means employed for its accomplishment. When an officer arrests a fugitive from justice, or a party accused, the officer must determine the identity, and use his discretion and information for the purpose. When an arrest is made under this statute, the means of determining the identity are prescribed by the statute, but when the means are used and the act done, it is still a ministerial act. The statute only substitutes the means it provides for the discretion of an arresting officer, and thus gives to the fugitive from service a much better protection than a fugitive from justice can claim under any law.

"If extradition is the only purpose of the statute, and the determination of the identity is the only purpose of these proceedings under it, it seems to me that the objection of unconstitutionality to the statute, because it does not furnish a jury trial to the fugitive, is answered; there is no provision in the Constitution requiring the *identity* of the person to be arrested should be determined by a jury. It has never been claimed for apprentices nor fugitives from justice, and if it does not belong to them, it does not belong to the respondent. And if extradition is a ministerial act, to substitute in its performance, for the discretion of an arresting officer, the discretion of a commissioner instructed by testimony under oath, seems scarcely to reach to a grant of judicial power, within the meaning of the United States Constitution. And it is certain that if the power given to and used by the commissioners of the United States courts under the statute is unconstitutional—then so was the power given to and used by magistrates of counties, cities, and towns by the Act of 1793.

"These all were commissioners of the United States—the powers they used under the statute were not derived from the laws of their respective States, but from the statute of the United States. They were commissioned by that and by that alone. They were commissioned by the class instead of individually and by name, and in this respect the only difference that I can see between the Acts of 1793 and 1850 is that the latter reduced the number of appointees and confined the appointment to those who, by their professional standing, should be competent to the performance of their duties, and who bring to them the certificates of the highest judicial tribunals of the land."

the proposition, upon the correctness of which all those decisions depend which decide this question by referring to the decisions under the law of 1793—the proposition that the action of the State magistrates under the earlier law was an exercise of power politically derived from the United States. In this Mr. Loring followed Judge Shaw's reasoning in *Sims'* case.

§ 902. A portion of the Opinion of Attorney-General Crittenden, which has already been referred to, is very remarkable as containing a recognition of the judicial character of the action of the judges and commissioners under the Act of 1850.<sup>1</sup>

§ 903. The advisory Opinion of Nov. 9, 1850, given by B. R. Curtis, Esq., as counsel for the United States Marshal, was especially directed to the question "whether a warrant and certificate from a commissioner, pursuant to the Act of 1850, are valid and effectual in law to justify the Marshal."

§ 904. From this historical exposition of authorities bearing on the question, whether the action required of the com-

<sup>1</sup> *Ante*, p. 531. 5 Op. of Atty.-Gen. 255:—"The sixth, and most material section, in substance, declares that the claimant of the fugitive slave may arrest and carry him before any one of the officers named and described in the bill, and provides that those officers shall have *judicial* [italics in the original] power and jurisdiction to hear, examine, and decide the case in a summary manner; that if upon such hearing the claimant, by the requisite proof, shall establish his claim to the satisfaction of the tribunal thus constituted, the said tribunal shall give him a certificate," &c. And on page 539:—"All the proceedings which it [i. e., this section of the Act] institutes are but so much of orderly judicial authority interposed between 'the slave and his owner.'" This was referred to by Mr. Rantoul in *Sims'* case, 7 Cushing, 289. Indeed, Mr. Crittenden's whole argument, in maintaining that the clause does not violate the constitutional guarantee of the writ of habeas corpus, rests on the assumption that the person claimed as a slave will be held in custody to await the decision of a judicial tribunal or under its decree. It seems probable that the objection to the Act as contrary to the constitutional limitation of the judicial power, was never raised before its enactment. It may have been the intention of Congress (blunderingly) to vest the judicial power. The Legislature of Virginia, Feb. 7, 1849, adopted report of a committee, concluding:—"This committee would therefore commend that an earnest effort be made, through the senators and representatives of this State in the Congress of the United States, to procure such amendments to the law of 1793, as shall confer, 1st, upon every commissioner" and other persons mentioned, as postmasters and collectors, "authority now granted to the judges of the circuit and district courts of the United States, to give to the claimant of a fugitive slave the certificate authorized by said Act, and to make the duties therein prescribed, mandatory;" and 4th, "To authorize all the officers clothed with judicial powers under such law," &c.

<sup>2</sup> *Ante*, p. 533. The portion relating to the question under consideration is as follows:—"The next question is whether this Act contravened the 1st sec. of the 3d art. of the Constitution. This article relates to the judicial power of the United States, and vests it in" \* \* \* "The argument, as I understand it, is, that the commissioners under this Act exercise judicial power; that they are not



missioners does or does not involve an exercise of the judicial power of the United States, it appears that the negative is maintained by all here quoted, with the exception of the opinions in the Wisconsin and Ohio cases.

The opinions supporting this negative may be discriminated as—

Those which determine the question by reference to existing judicial authority in earlier cases under the same Act :

Those which determine it by independent juristical reasoning.

The first of these classes is the larger. It will be seen that all the later opinions decide this question on the authority of Sims' case and the opinions announced during the first year after the enactment of the law, authorities which constitute the second class. The judges in the later cases seem particularly to avoid all expression of an independent agreement

judges during good behavior and with stated salaries, and so their jurisdiction is unconstitutional.

"It is impossible to come to a safe conclusion upon this or any other rule of the Constitution, by an examination of its mere words.

"It has reference to a great subject in the minds of its framers, and unless that is seen, the terms employed will not be understood as intended. No one who keeps this in view can suppose that this clause of the Constitution was intended to confine all judicial inquiries, of whatever nature, to judges described in this article. If it were so, no master-in-chancery could act in the administration of that system of equity which the Constitution itself provides for, and in which those judicial officers had for ages been a necessary part. No commissioner of bankrupts could be appointed under any system of bankrupt law which Congress, pursuant to the express power in the Constitution, might enact. No commissioner of patents could pass on the claim of an inventor, or the conflicting claims of different inventors. No justice of the peace in the territory which the United States might acquire for its seat of government, could discharge those duties so long and so usefully known to the people. And Congress could not delegate to any commissioner a special and limited power to make any judicial inquiry, for any purpose, without bringing them within the requisitions of this article. It may be added, that the practice of all departments of the government, since its existence, has, upon this assumption, been a continued series of violations of the Constitution. This is hardly admissible, and I feel obliged to look for some other interpretation.

"To solve this question, so far as it affects the matter now before me, it seems only necessary to turn to the next paragraph in the Constitution, which, by defining the subjects of the judicial power, shows what is the meaning of those same words in the preceding sentence. The only clause which can be supposed to touch these proceedings is, 'cases arising under the laws of the United States;' and the question is, whether this summary proceeding is, within the meaning of the Constitution, a case arising under the laws of the United States.

"This seems to me to be answered by what has heretofore been said respecting the nature of this proceeding. One definition given of a case under this clause is 'a suit, in law or equity, instituted according to the regular course of judicial proceedings' (3 Story's Comm. 507). The form of the definition may be varied, but it does not seem to me that a summary inquiry, designed to operate as

with those opinions, and are careful to indicate that they follow them only on the maxim *stare decisis*.

On the first of these two classes of opinions, no comment is necessary; such opinions depend entirely upon the value of opinions assigned to the second class.

In this second class the arguments are distinguishable as :

1. That which declares the power to be exercised by the commissioners to be the same which, by the law of 1793, was to be exercised by the magistrates of counties, cities, and towns corporate; that in *Prigg's case* and the earlier cases, it was decided that this power might be exercised by these officers; and that hence, on the authority of these cases, it must be held that the power is not the judicial power of the United States.

2. That which assumes a parallelism between the action of Governors of States, in delivering up fugitives from justice, and the action of commissioners in these cases; thus finding an argument from authority.

a condition for executive action, in order to accomplish some special and limited object, and not to try and finally determine the right between party and party, can be considered a 'case' for the judicial power of the United States, to be tried only by such a judge as the Constitution provides. Many instances may be put in which inquiries, in their nature judicial, are proper preliminaries to the action of the Government, where the Government cannot properly act without such inquiries, and yet they are manifestly not cases to which the judicial power under the Constitution extends, and accordingly, the mode of inquiry and the officers by whom it shall be made, are within the discretion of Congress. The question, who are the rightful claimants of money held by the Government under a treaty, and how much belongs to each, is one instance. The Government has the power to refuse to pay any part to any one. It desires to do justice, and for its own information has these inquiries made, as a condition and guide to its action. Of a like nature, so far as the power of Government is concerned, seems to me are the inquiries which are directed by this law. The Government has the power to refrain from acting at all. It thinks proper to act in aid of the master, who, by force of the Constitution, may seize and carry away the slave without the aid of the executive power. But before the aid of the executive power shall be granted, Congress directs that certain inquiries shall be made, and that the executive power shall be used only upon the finding, by the appointed officers, of certain facts. I cannot see why Congress may not require the marshal to act on these conditions if he [? it, i. e., Congress] sees fit.

"Let me not be understood to entertain the opinion that by changing the form of proceeding, or substituting a summary, for a regular judicial proceeding, Congress can enlarge its own authority or affect the rights of the citizen. The inquiry will arise in every case, which I have heretofore endeavored to consider in this case, whether Congress has the right to adopt and apply such a proceeding to the particular class of cases, and order the executive to act upon the result of such a proceeding.

"Having come to the opinion that in this class of cases Congress may do so, I feel no difficulty in saying that such a proceeding is not 'a case,' within the meaning of the Constitution, to be tried only by judges holding their offices during good behavior and for stated salaries."



3. That based on the doctrine that the constitutional provision contemplates summary proceedings, and that such proceedings do not involve judicial action.

4. That which, on elementary principles, declares that the power exercised is not in its quality that kind of power designated in the Constitution as the judicial power of the United States.

5. That which may be called *argumentum ex necessitate* or *ab inconvenienti*.

§ 905. 1. As to the first argument, it has been shown that there is not sufficient reason for saying that the Supreme Court in Prigg's case, or any State court, ever intended to justify the action of any magistrates of counties, cities, or towns corporate, under the law of 1793, as an exercise of any power whatever *derived from the United States*.

This argument is, therefore, defective.

§ 906. 2. As to the parallelism in the delivery of fugitives from justice. The parallel fails, because it cannot be shown that the Governors of the States, in making the required delivery, have exercised power derived from the United States. On the contrary, the authorities and reasoning from general principles indicate that the power is derived from the State.<sup>1</sup> The parallel is, therefore, defective. But even if the power of the Governors were derived from the United States, the parallel would not hold, because, under the wording of the provision respecting fugitives from justice—"shall be delivered up, *to be removed to the State having jurisdiction of the crime*"—and the presumption existing between sovereign states, and particularly between the States under the Constitution, the delivery of a person accused of crime is a preliminary proceeding in reference to a prospective exercise of judicial power.<sup>2</sup> This difference between the two acts of delivery will be again noticed hereafter.

§ 907. 3. As to the argument founded on the proposition that the Constitution authorizes a summary proceeding, and that such a proceeding cannot involve judicial action. The

<sup>1</sup> *Ante*, §§ 848-850.

<sup>2</sup> *Ante*, § 860.

question whether the claim arising under the Constitution may be determined in a summary proceeding,—that is, a proceeding without the formalities of a trial by jury according to the course of the common law,—is to be considered in the next chapter. But, admitting that such proceeding is not contrary to the guarantees of the Constitution, this argument assumes that the quality of the power exercised depends upon the form of the act. It is not to be admitted that an act of judgment or decision which is exhaustive and complete, to apply a law and enforce its consequences on persons and things in and for a certain geographical forum, is ministerial, as opposed to judicial, if only performed in the way here called *summary*. The distinction between a ministerial and judicial act, is in the nature of the power, having regard to the elements of legal jurisdiction and the effect produced in legal relations between private persons.<sup>1</sup> The distinction between summary proceedings and those not so, lies in the forms under which the power is exercised. Decisions which are most clearly of the judicial character may be given by a single judge; and an act of judgment by the court alone is not less judicial than the determination of a mixed issue by a jury under direction of a court. In many countries the bulk of legal controversies are determined by a judge or judges, in a way more or less summary as compared with our practice. It would be absurd to say that in such cases there were no judicial proceedings, or that the judicial power was not there exercised. A colonial statute of Delaware, of 1760,<sup>2</sup> substitutes “a short and summary manner” for deciding cases of disputed freedom, in place of the common-law method. The proceeding prescribed is before a court “hearing the proofs and allegations of the parties in a summary way.” By a law of that State of 1852, these suits are to be tried in the Superior Court “in a summary way,” from which an appeal lies to the highest court, as on any other solemn judgment.<sup>3</sup>

<sup>1</sup> *Ante*, Vol. I., p. 507.

<sup>2</sup> *Ante*, Vol. I., p. 292.

<sup>3</sup> *Ante*, p. 81. Here may be noticed an argument which has been drawn, in some defenses of the law of 1850, from the eighth article of the compact between the New England colonies of 1643, to which reference has already herein been made, in construing the provision for the delivery of fugitives from justice. (*Ante*,



§ 908. 4. As to the argument, that the action of the judge or commissioner is an exercise of power not in its nature judicial, it is to be noticed that, while the judicial character of any act of judgment is determined not merely by its effect upon the subject matter—person or thing—but by its consequences in respect to a certain forum or geographical district, no notice is taken, in the opinions in which this argument occurs, of the State in which it is performed, as being the jurisdiction standing in this relation to the act of judgment performed by the commissioners. The international operation of this act of judgment is left out of view; or it is assumed to be an act occurring exclusively under the internal law of a single forum or jurisdiction. It is assumed that, under the Act of Congress, if not under the Constitution in the first instance, such a connection is established between the State in which the fugitive is claimed and delivered up and that from which he escaped or is supposed to have escaped, that the two constitute, under the national law, one forum, *pro hac vice*, and that the act of judgment is “preliminary” or ancillary to some other act of judgment, to be performed in the same forum, in which the judicial function will or may operate.

There are probably none who would say that the act of determining the whole question whether a certain person, being presumptively of free status in one State, may or may not be taken by another as his slave and carried thence into bondage elsewhere, is not a complete exercise of judicial function.<sup>1</sup>

p. 548.) It has been argued that Congress may entrust the decision of this claim to a commissioner, and without jury trial, because by that inter-colonial article “the magistrate, or some of them, where, for the present, the said prisoner or fugitive abideth,” was authorized to deliver up “the fugitive for any criminal cause.” *Ante*, Vol. I., p. 269, n. [c.] It may be assumed that the same magistrate could, in like manner, deliver up a runaway servant, though this is not declared in the clauses relating to such persons, *ib.* [b.] But it must be remembered that this compact was an agreement between parties who in this matter acted as sovereigns; it was not a legislative act whose validity could have been measured by some constitution controlling the legislator. Again, if the argument be of any force to the objection of necessity of jury trial, it fails on the objection of undue exercise of the judicial power, for at that time in New England, the term “magistrates” was applied to the highest functionaries of the local government, vested with ordinary judicial powers.

<sup>1</sup> The direction to the sheriff, in the writ *de nativo habendo et de libertate probanda*, ran thus: “tunc ponas loquelam illam coram justiciariis nostris ad primam assisam cum in partibus illis venerint, quia hujusmodi probatio non pertinet ad te capiendum.” *Fitzh. Reg. Br.* fol. 1, 87.

Jacobs' Law Dict., Vol. II., p. 325. *Justices of the Peace*, IV. “The power

The denial of the judicial character of the proceeding is made in asserting that the act is merely an identification of a certain person with a view to ulterior proceedings.

Thus the act of judgment of the judge, magistrate, or commissioner, under the laws of Congress, is assumed to be comparable to the ordinary action of the United States commissioners in carrying into effect those laws of national origin which operate in the United States as one forum or jurisdiction, i. e., the national municipal law, or to the ordinary action of inferior magistrates in arresting or holding to bail persons in one subdivision of a State forum, with view to ulterior judicial action in the same or some other subdivision of the same forum. This idea is further illustrated by the assumption of a parallelism between the delivery of a fugitive from labor under these statutes and the extradition of a fugitive from justice under the law of 1793.

The inadmissibility of this assumption can only be shown by an independent exhibition of the true nature of this act of judgment in reference to the various elements of jurisdiction which are presented in such a case. This exhibition will occur in the attempt herein presently to be made, to state the true view of the question, as justified by the authorities and principles already set forth.

Or, in some arguments, the commissioner's act of judgment is asserted not to be distinguishable from those examinations of facts which are made by the commissioners and others, such

of justices is *ministerial* when they are commanded to do anything by a superior authority, as by the Court of B. R., &c. In all other cases they act as judges; but they must proceed according to their commissions, &c. Where a statute requires any act to be done by two justices, it is an established rule, that if the act be of a judicial nature, or is the result of discretion, the two justices must be present to concur and join in it, otherwise it will be void; as formerly, in orders of removal and filiation, the appointment of overseers, and now in the allowance of the indenture of a parish apprentice; but where the act is merely ministerial, they may act separately, as in the allowance of a poor-rate. This is the only act of two justices which has yet been construed to be ministerial; and the propriety of this construction has been justly condemned. 4 T. R. 386."

The act of admitting to naturalization is a judicial act. *Ritchie v. Putnam*, 13 Wendell, 524. Even though it be doubtful whether the admission is conclusive as *res judicata* on other tribunals. *Banks v. Walker*, 3 Barb. Ch. R. 438. State courts may naturalize in virtue of concurrent judicial power. *Heydenfeldt, J., Ex parte Knowles*, in the *Alta California*, Aug. 15, 1855.

The commissioner's act of judgment can hardly be thought less judicial in its nature than an admission to naturalization, or than one of those acts in which, under the English statutes, two justices were required to join.



as commissioners in bankruptcy, masters in chancery, in declared subordination to some court and its ulterior action. In this again the entirely independent effect of the commissioner's decision, in respect to the forum in which it is pronounced, is ignored, or an imaginary connection is set up between its action and the possible ulterior action of some unknown and indeterminable court in some other forum.

Or, in other instances, the character of the provision and statute, as private law, and of the action of the commissioner, as determining the existence of legal rights and obligations in a relation between two natural persons, is ignored, and it is assumed that the national Government, as a party concerned, grants, gives, or recognizes obligations due by it in its sphere of public action, which it may determine in any way it may think proper. This is illustrated in comparing the determination of these cases to the determination of claims for new patents, and of claims on the Government under a treaty.<sup>1</sup>

Connected with this last argument or assumption, is the doctrine that the judicial power can be exhibited only in a *case* arising, &c., and that here is no case at all. But the only argument offered, to show that this is no case, is that the proceeding is necessarily or properly a summary one, on some one of the reasons above given.<sup>2</sup>

§ 909. 5. As to the fifth argument, which is an admission that, according to ordinary criteria, the statute does not accord with the Constitution, but that it must be presumed that the provision was intended to be made effectual for the object indicated; that it could not otherwise have been made effectual than by giving this power to the commissioners. This argument is also employed in reference to the objection that the Act of Congress violates the guarantees in the Constitution for

<sup>1</sup> The failure of the similar parallel in the case of fugitives from justice has been pointed out, *ante*, § 856. If the argument there given applies in that instance it must, *a fortiori*, in these cases.

<sup>2</sup> For illustrations of the arguments above excepted to, see the citations of opinions of Judge McLean, Judge Nelson, Mr. G. T. Curtis, Mr. Loring, and Mr. B. R. Curtis. See, particularly, the advisory Opinion given by the last, where all these ideas are blended together. Mr. Curtis was indeed careful to say that he did not mean that the form of the proceeding determines the nature of the power. But there is a circuitry in the reasoning, nevertheless, for it is said—it is a summary proceeding because it is not a case, and it is not a case, because it is a summary proceeding.

private rights. It will, therefore, be considered in the next chapter.<sup>1</sup>

In insisting that in the present appointments of judges for the Territories, or in a supposed appointment of officers of the United States resembling justices of the peace, there would be an equal violation of the Constitution, if it has been violated for the action of commissioners under the fugitive-slave law, another form of the argument of a constitutional necessity for passing over the requirements of the Constitution, as known by ordinary interpretation and construction, presents itself.

But it is evident that an admitted necessity of violating a rule in one instance, is no argument for violating the same rule in another. Each such case of necessity must stand by itself, on its own necessity.

It is going very far for an argument, to assume that it must in some cases be necessary to confer the judicial power of the United States on justices of the peace, under some law which has never yet been passed. And, as to the powers exercised by the national Government in the Territories, there is much room to question whether they depend upon any grants of power in the Constitution, or whether they are not removed from the restrictions imposed on the functions of the national Government within the States, by the clause in the third section of the fourth Article, giving Congress power "to make all needful rules and regulations respecting the territory," &c.<sup>2</sup>

§ 910. According to the method herein pursued, the following is presented as the proper exposition of the question.

And first, as to the real weight of judicial authority.

a. It has been shown that the mass of authority later than 1850, rests on the previous opinions of Chief Justice Shaw and the dicta of Judge Nelson, with, perhaps, those of some other judges of the national courts in charges to juries, which

<sup>1</sup> In connection with this argument might be noticed what may be designated the *argumentum a nigritia*—that the persons to be affected by this law are not of the white race. But, admitting that this argument should apply to determine the extent of those guarantees of private rights which are to be considered in the next chapter, the question here is of a provision of public law. And, as it concerns the white people of the United States that power should not be exercised in violation of the Constitution, it is not a justification of a violation of such a provision that it is *experimentum in corpore vili*.

<sup>2</sup> See Whiton, Ch. J., *ante*, p. 671.



opinions and dicta are mainly an assertion that all question on this point is precluded by the decisions under the law of 1793; while Judge Shaw (who, from the nature of the case in which the opinion was delivered, is unquestionably the highest existing judicial authority on this particular question) said in the same judgment:—"At the same time it is proper to state, that if this argument, drawn from the Constitution of the United States, were now first applied to the law of 1793, deriving no sanction from contemporaneous construction, judicial precedent, and the acquiescence of the general and State governments, the argument from the limitation of judicial power would be entitled to very grave consideration."

Now, if this argument did not, for the reasons already stated, apply to the law of 1793, yet it unquestionably does to the law of 1850, for the commissioners can derive their powers from no other than the national source; and if the argument did not apply to the law of 1793, the cases under that law and the acquiescence of the general and State Governments in that law, are no authorities for deciding the question when it actually arose under the law of 1850. Hence it follows that Chief Justice Shaw's Opinion, pronouncing the judgment of the Supreme Court of Massachusetts in *Sims'* case, may reasonably be deemed rather an authority against the constitutionality of the action of the United States commissioners.

b. Supposing that on this reasoning the weight of authority on this point, though popularly received as overwhelming, is measurably diminished, it may be permitted to refer to the opinions expressed by the State judges on this question in the *Wisconsin* and the *Ohio* cases. For, though the point was not involved in those cases, it is undeniable that no judicial reasoning to the other side has ever been since produced. The Supreme Court of the United States, in *Ableman v. Booth*, may be supposed to have intended to pass upon the constitutionality of the law only so far as it was actually requisite for the decision of the case before them; and it is an admitted principle that neither that court nor any other, under our system of government, has power to decide on the propriety of any legislative enactment generally, that is, without reference to its

effect on actual parties in some case before the court. The juristical dissertations of the members of that high tribunal, on points not actually before them, command the profoundest respect of the profession and the public; and on points of great political importance, as shown in notable instances, they have been urged as controlling authority. But it has not been customary for other courts to admit a general assertion of the constitutionality of an Act as conclusive on all possible points in which the validity of the law may be questioned, when they have not been in issue before the court in a case.

c. If the view of the bearing of the opinions delivered in Prigg's case, which was presented in another chapter, is correct, the majority of the court justified the action of State magistrates only so far as it was an exercise of the concurrent *judicial* power of the State.

Now, we have the authority of Judge Shaw in Sims' case, and of the many judges who have followed his decision, that the action of the commissioners involves an exercise of power not distinguishable in quality from that which, under the law of 1793, was exercised by the judges of United States courts and the State magistrates whose action was approved in Prigg's case and the earlier cases in the State courts. Admitting this, it follows that Prigg's case is authority for saying that, in performing the action required of them, the commissioners will exercise the judicial power of the United States.

d. If there is any parallel between the delivery of a fugitive slave under this provision and the extradition of criminals under the other, there is some authority for holding that it indicates the judicial character of the commissioner's act of judgment.<sup>1</sup> We have the opinion of Kent that the act of judgment now performed by the Governors of the States, should, if performed by any one in virtue of power derived from the United States, be performed as a part of the judicial function.<sup>2</sup>

§ 911. Secondly; it is to be inquired, independently of any judicial authority on this point, what may be known of the power exercised by the commissioners?

<sup>1</sup> *Ante*, §§ 851-858.

<sup>2</sup> *Ante*, § 847, and note.



a. And, first: how far may the nature of this power be known from the basis assumed for the legislation of Congress?

It was concluded, in the twenty-seventh chapter, that that legislation can only be justified as it may carry into effect a power belonging to the judicial department of the Government, a part of the judicial power of the United States in a case arising under the Constitution by giving the provision the fourth construction.

Moreover, if the theory adopted by Judge Story in *Prigg's* case is to be adopted, the legislation of Congress is equally to be justified as carrying into effect a power belonging to the judicial department of the Government, a part of the judicial power of the United States in a case arising under the Constitution by giving to the provision the third construction.

But if, under either theory, the commissioner's act of judgment is adequate to the whole object of the provision, it disposes of all that was involved in the supposed "case arising under the Constitution;" and the conclusion is inevitable that in his action he has dispensed that power which, in the argument, was before supposed to be the judicial power of the United States.

Now, under either theory, the object of the provision is to cause the fugitive from labor to be delivered up to the custody of the person to whom his service is due by the law of the State from which he escaped.

It may be that this object could be answered by delivering up the fugitive in some State other than that in which he may have been found.

But it cannot be doubted that the action of judges and "State magistrates," under the law of 1793, was always taken to result in the accomplishment of the object of the provision whenever the certificate was granted which allowed his being removed. Judge Tilghman said, in *Wright v. Deacon*, 5 S. & R., p. 64, "that the effect of the action of the judge or magistrate was to place the slave just in the situation he stood before he fled." The provision itself could not have required more than this. It has repeatedly been said, in justifying the action of the commissioners under the law of 1850, that their action is in no

respect distinguishable from that of the judges, &c., acting under the law of 1793. It is matter of authority, therefore, that, if these are "cases arising under" the constitutional provision, and so within the judicial power of the United States, they have been completely met by the action of commissioners under the law of 1850; that the reciprocal rights and duties which were to be maintained and enforced in the "cases arising under" this provision have been maintained and enforced by the commissioners; so that they must be held, in the end, to have accomplished that object which, in the outset, was supposed to have been delegated by the Constitution to the judicial power.

If it is said that there is no sufficient authority for the fourth construction, and that Judge Story's express recognition of a case within the judicial power was a casual inadvertency, irreconcilable with the residue of his Opinion, or with the Opinions of his associates; and that, under the third construction, adopted by him, the Government is one of the two parties on whom the provision acts as a rule (the claimant being the other); that the Congress has appointed the commissioner to be the agent of the Government for settling this claim made upon it, without any reference to judicial action, as a party may always settle his controversies out of court in any way he thinks fit,—it is then to be inquired whether, under the law passed by Congress, a case does not arise within the judicial power of the United States.

So, if the only other theory for the legislative power of Congress be adopted—that founded on the second construction—according to which Congress legislates to enforce a duty of the State correlative to the claimant's right, the question occurs, whether a case within the judicial power of the United States has not arisen under a law of the United States, or "under the Constitution and laws of the United States."

If, under either of these two constructions, the second or the third, the claimant's right is imperfect, and requires some legislation, either of the national Government, or of the States, to make it a legal right,<sup>1</sup> yet it seems the legislation of Con-

<sup>1</sup> *Ante*, § 749, in Story's Opinion, from 16 Peters, 614, 615.



gress produces an effect precisely like that attributed to the provision itself under the fourth construction. A legal relation is established between the claimant and the fugitive in the State into which the latter may have escaped. Neither is the Government thereafter recognized as a party (according to the third construction), nor is the State in which the fugitive is found so recognized (according to the second construction), but the law of Congress acts like private international law, operating in the State in which the fugitive is found. The effect produced is the same as if the private law of the State which is the forum of jurisdiction recognized the master's right to carry away with him his escaped slave, on establishing a claim for his person before the local public authority; and that this would be a case within the judicial power is indisputable.

If, while admitting that a case thus arises, either under the provision itself, as the foundation of the legislation, or under the Act of Congress, it be said that the commissioner does not judicially dispose of such case, but makes only such a preliminary disposal of it as must occur in view of possible judicial action thereafter, this allegation is equivalent to that made in that argument in favor of the constitutionality of the action of the commissioners, which has herein been classed as the fourth argument.<sup>1</sup>

§ 912. This argument is now to be more fully considered under the question—

b. What is the character of the act of judgment, reasoning from elementary principles?

It will here be assumed that every act of judgment is judicial which is final in reference to some particular forum in which the rights and obligations affirmed or denied by that act of judgment are to be exercised.<sup>2</sup> The action of the commissioner determines the rights and obligations of the claimant and the alleged slave in and for the jurisdiction of the State in which the latter is found, and in and for that alone, without reference to any other State.

<sup>1</sup> *Ante*, p. 683.

<sup>2</sup> *Ante*, § 464.

It is true that the certificate, according to sec. 6 of the Act, is to be given "with authority to such claimant, or his or her agent or attorney, to use such reasonable force or restraint as may be necessary, under the circumstances of the case, to take and remove such fugitive person back to the State or Territory whence he or she may have escaped as aforesaid." It may, however, be questioned, whether this clause in the statute has any other effect than to be a security to the claimant in case he should be obliged, in returning to his place of domicil, or should choose, in so returning, to pass through States wherein slavery is not recognized; and whether it diminishes in the slightest degree his power to place the person of the alleged fugitive in any place whatsoever where local law will sanction his introduction. It may even be questioned whether Congress has the power to make it obligatory on the claimant to carry the supposed slave back to the place of domicil.

This will depend on the construction to be given to the provision. If, by the true construction, no legal right exists in the claimant, under the provision itself, independently of legislation (as supposed in the second and third constructions), then indeed it may be that Congress, if it has the power to give existence to the right, may modify it, to a certain extent at least. But if the claimant's legal right exists under the provision itself (according to the fourth construction), it is a right to have his slave delivered up to him on claim; and in this respect it is distinguished from the right given in respect to a fugitive from justice, who, by the words of the Constitution, is to be "delivered up, to be removed to the State having jurisdiction of the crime." The Constitution, in the case of fugitives from labor, does not speak of any such transfer from jurisdiction to jurisdiction. It may be that, if this delivery can be made by the national Government, it might be made in any other part of the United States, as well as in the State in which the fugitive is found. But it would appear that, after the claim had been finally determined, Congress would have no power to limit the claimant's right by requiring him to return the fugitive to the State from which he escaped.



The Acts of Congress follow the provisions on which they are founded. The rendition of the fugitive from justice to the State where he is to be tried, is spoken of in the Act of 1793. But neither in that Act nor in that of 1850 is the master required to carry back the person he may hold as his escaped bondman. It may be supposed that the power to detain the latter will continue for such time as may suffice for convenient removal. But, if the master remains voluntarily with his recaptured slave beyond that time, the constitutional guarantee must cease to operate, and the slave may become free by the law of the forum. The claim might be made and the delivery effected, *under this provision*, when the fugitive had been found in a State permitting slavery; and then the possession of the master would continue, by the local law of that State, so long as he should choose to remain in it. Or, whatever might be the local law of the State in which the delivery takes place, the master could remove the supposed fugitive to any other State, or any other country, and retain him in slavery therein, if the local law should permit it. The delivery to the claimant, under the provision and Acts of Congress, is in all respects like a delivery upon claim made under the local law of a jurisdiction wherein slavery is lawful, in a case in which the master's right is denied by some third party, or in one in which the supposed slave should himself deny the right. While the claimant is *in itinere* with the supposed slave to the State from which he came, his custody continues under the Constitution and is protected by the statute. But he is not bound to proceed thither, and this protection may not be sufficient to induce him to do so. If the fugitive is carried to some slaveholding jurisdiction, his status will be determined by the local law thereof; this provision of the Constitution will have no effect upon it.

§ 913. It is certain that if any State magistrate, under the law of 1793, acted in virtue of the judicial power of his own State, a certificate given by him had no power beyond the limits of that State, and could not compel the claimant to return the slave to the State from which he was supposed to have escaped; his act of judgment operated in and for the

State alone, and it has always been held that the act of a judge or commissioner under the law of 1850 is not distinguishable in its operation from the act of a judge or State magistrate under the former Act.<sup>1</sup>

There are no means provided for securing this actual rendition from jurisdiction to jurisdiction independently of the will of the claimant;<sup>2</sup> there is no penalty for the party holding the certificate for failing to carry it out—no officer appointed to ascertain whether it has or has not been carried out. The party holding the certificate being a private individual, there is no such presumption of public law (comity, as it may be called), which may authorize the legal presumption that the fugitive slave, like the fugitive from justice, will be transferred to the State by whose laws he is supposed to have been held to service.<sup>3</sup>

There is no case in which a certificate has been granted in which it is now possible to show, by public record, that the fugitive was actually taken back to his supposed domicile; and the effect of such a certificate as a limitation of the master's right over the person and services of the slave, while in transitu, has never been made a subject of judicial inquiry in States through which he has been carried after the certificate has been given. It would appear that the master's right under the Constitution, after the claim has been established, is to sell and dispose of the slave and of his services, and to transfer him to any jurisdiction where slavery is allowed, and that no limi-

<sup>1</sup> See in connection with this the argument in § 883. If the commissioner's certificate requires the rendition of the supposed slave to the State from which he is said to have escaped, he must be under the control of national public authority until he is so carried back. But then the same must have been the case under a State magistrate's or a judge's certificate under the law of 1793, and yet in *Worthington v. Preston*, 4 Wash. C. C. 461, where the keeper of the prison held the slave in custody *after he had been delivered to the claimant with a certificate*, it was held that the keeper was merely acting as the private agent of the master, not as the instrument of public authority.

<sup>2</sup> It is only when the party claimant makes affidavit that he apprehends a rescue, that, by the 9th section of the Act, the officer of the United States who has the fugitive in his charge is bound "to remove him to the State from whence he fled, and there to deliver him to said claimant, his agent or attorney."

Here appears the utter fallacy of the assertion, which has sometimes been made, that the provision and legislation of Congress is based upon securing to the slaveholding States, as States, a property, or what Judge Baldwin called "political property." See *ante*, p. 445, note.

<sup>3</sup> *Ante*, § 859.



itation of this right has been attempted in the legislation of Congress.<sup>1</sup>

§ 914. But even if there were any force in the certificate given by the commissioner to oblige the rendition of the supposed fugitive to the State from which he was said to have escaped, or if the legal force of the certificate was correctly described by Judge Sprague,—“It is merely an authority to carry the person named from one State to another—that is its whole legal effect,”<sup>2</sup>—it is nevertheless evident that the commissioner’s act of judgment is a finality as regards the forum in which it is pronounced. Whatever may afterwards be judicially done, as between the claimant and the supposed fugitive in the forum to which the latter is taken will be an independent and original proceeding, having no connection, as an act of remedial jurisprudence, with the commissioner’s act of judgment. As Judge Sprague says, very simply, “What may be legally done with that person in the State to which he is carried, depends on the laws of that State.” It is precisely this final transfer of the person, from one jurisdiction which determined his individual rights in one way, to another which may determine them in the same or in some other way, which makes the proceeding a judicial one according to Judge Sprague’s definition of a proceeding which is a judicial one “under our jurisprudence.” There is no connection established in these instances between the action of the commissioner in the State from which the fugitive is removed and the administration of justice in that to which he is taken. The fact that the removal takes place

<sup>1</sup> In *Sims’ case*, Mr. Commissioner Curtis seems to have admitted that under the provision of the Constitution a case arises within the judicial power. Mr. Rantoul, counsel for *Sims*, argued that the commissioner is by the statute required to carry into effect the whole purpose of the provision as the rule determining the right of the master and the correlative obligations of the slave and of third parties; and that therefore the “case” would be determined by the commissioner’s act. Mr. Rantoul took that view of the effect of the statute which is here given in the text, maintaining that the master’s right or power became absolute on getting the certificate; that he might carry the supposed fugitive to any other State, or to any foreign jurisdiction; that the commissioner’s decision was equivalent to that of a judge deciding, in and for a State, the issue of *liber* or *non liber* under the local law. (See Mr. Rantoul’s 7th point, IV. Mon. L. R. 5, and the claimant’s 3d point, *ib.* 6.) Mr. Curtis held his action to be preliminary merely (see the Opinion, *ante*, p. 676, note.)

<sup>2</sup> See also *post*, § 923, Thompson, J., in *Martin’s case*, § 926, McLean, J., in *McQuerry’s case*, and § 933, the Opinion of B. R. Curtis, Esq.

under a rule which rests on the national authority may induce the idea that a law has been carried into effect which operates in the United States as one jurisdiction, in view of which the States are like counties or local districts under one municipal (internal) law. In the case of fugitives from justice this may be the case, under the language of the provision and public comity, even if no parallel can be found in the extradition of foreign criminals. But in the case of persons claimed as owing service or labor, there is no such amalgamation of the two States. There was in the jurisprudence of England a judgment of outlawry. In the instances here contemplated, the person carried away under a certificate is outlawed in respect to the State in which he is found; he is as conclusively removed from the judicial power and protection of that State as though he had been annihilated. To say that, in another State to which he may be and probably will be taken, ulterior acts of judgment may take place which will be *judicially* performed, is nothing to the purpose in the argument.

§ 915. It is sometimes said that the action of the commissioner is not judicial, because the certificate could not be set up in support of a plea of *res judicata* in a suit for freedom brought in the State to which the person removed as a fugitive from labor may be taken. But, in point of fact, it is so pleaded in the forum in and for which it is rendered, that is, the State in which the fugitive is claimed. In that forum it is made conclusive against every other manifestation of judicial power, State or national.<sup>1</sup>

§ 916. If Congress had provided a proceeding under which the slave would continue in the custody of the national public authority *in transitu*, before the claim should be finally determined under that authority, the action of a commissioner who should grant a warrant or a certificate for removal in view of a hearing of the claim before a tribunal acting under that authority in the State from which the person claimed is alleged to have escaped, and by whose laws he is supposed to be held to service, would have an entirely different character. The commissioner's action would then be that which, in opinions

<sup>1</sup> Compare Judge Conckling's assertion that it is like a judgment. *Ante*, p. 665.



already cited, it has been affirmed to be under the Act of 1850. Or even if it were provided that the master's custody should not be complete until, in the State from which the alleged slave is supposed to have escaped, some judgment had been passed by the local authorities, it might, by some stretch of the vaguest doctrine of comity between the States, or comity between the State Government and the national Government, be pretended that the act of transfer from jurisdiction to jurisdiction is ministerial only. There would then be a real parallelism between the removal under the commissioners' action and an extradition in the case of a fugitive from justice.

§ 917. The conclusion resulting from the foregoing considerations is, that the action of the commissioners in granting a certificate, as contemplated by the Act of 1850, does involve an exercise of the judicial power of the United States. This conclusion is entirely distinct from any answer to the question, whether the guarantee of jury-trial is violated by the proceedings under these Acts of Congress. But the arguments to be considered in the determination of that question may have a bearing more or less confirmatory of this conclusion. That question is to be considered in the following chapter.

## CHAPTER XXX.

DOMESTIC INTERNATIONAL LAW OF THE UNITED STATES. THE SUBJECT CONTINUED. OF THE LEGISLATION OF CONGRESS IN RESPECT TO FUGITIVES FROM LABOR. THE SUBJECT CONTINUED. OF THE VALIDITY OF THAT LEGISLATION IN VIEW OF A GUARANTEE, IN THE CONSTITUTION, OF TRIAL BY JURY, AND OF OTHER PROVISIONS OPERATING AS A BILL OF RIGHTS.

§ 918. The questions which next present themselves, in considering the means provided by Congress for carrying into effect the provisions of the Constitution for the delivery of fugitives from labor, as stated in a former chapter,<sup>1</sup> relate to—

2. The remedial process by which the demand or claim is to be presented, the proofs on which its legality is to be decided, and the method in which the delivery to the demandant or claimant is to be carried into effect.

The question which will first be considered is, whether the Acts of Congress of 1793 and 1850, or either of them, by providing for the removal of the persons claimed without submitting the facts at issue to the decision of a jury, is in violation of any guarantee in the Constitution operating as a Bill of Rights.

In the public and private discussions which have arisen in respect to the execution of the constitutional provision, it has been urged that such trial is required by the declaration, in the fifth article of Amendments, that "no person shall be deprived of life, liberty, or property, without due process of law," and that in the seventh article, that, "in suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved."

§ 919. To say nothing of the actual legislation of Congress

<sup>1</sup> *Ante*, p. 607.



as authority against the objection, every case in which an alleged fugitive from labor has been delivered up, as provided in either Act of Congress, by a judge holding the judicial power of the United States, or the concurrent judicial power of a State, and every case in which the delivery of such alleged fugitive by a United States commissioner, as provided by the law of 1850, has been sanctioned by a national or State court, is an authority that these guarantees have not been violated by such legislation. These constitutional guarantees, it will be remembered, operate only against the exercise of power derived from the national source.<sup>1</sup> The judges of State courts acting in any of these cases, as provided by the law of Congress of 1793, derived their authority from the State, and not from the United States. Hence, such action by a State judge does not have the same force as a precedent in this inquiry. Still, the powers held by the State judiciary must have been limited by similar provisions in the State constitutions, and hence their action in these instances may be received as an exposition of constitutional law in a parallel question. In many of these instances, too, it is probable that the State judges did not actually discriminate whether their powers in the premises were derived from the State or from the United States. If the true doctrine is that the "State magistrates," acting according to the law of 1793, exercised power derived from the national source, the cases in which such officers have acted are direct authority.

§ 920. It might, at the first view, appear that the opinions in which the claimant's right to seize and remove a fugitive out of the State into which he may have escaped, without any proceeding under either Act of Congress, has been affirmed, are also authority against the applicability of these guarantees in cases arising under the legislation of Congress. But if any right of the claimant in respect to the escaped slave has been given by the Constitution itself, and does not owe its existence to the legislation of Congress, it would seem that such right could not be affected by those guarantees of the Constitution which limit the national Government in its several functions. It is not claimed by any that the right to seize *and remove* the

<sup>1</sup> *Ante*, § 425.

fugitive without a certificate is given by the legislation of Congress. These cases, therefore, are not authority in the present inquiry.<sup>1</sup>

§ 921. In this inquiry, the cases under the law of 1793 are of the greater importance, since they are relied upon almost exclusively in deciding the question under the later Act. The bearing of those cases upon the question under consideration is, however, very unequal.<sup>2</sup>

In *Wright v. Deacon* (1819), 5 Serg. and Rawle, 62 (*ante*, p. 438), the question directly before the court was of the validity of the statute of Pennsylvania providing a trial by jury in these cases. The question of the effect of the fifth and seventh articles of the Amendments to control the power of Congress does not appear to have been directly presented to the court. But Tilghman, Ch. J., expressly declared that the Act of Congress of 1793 was not unconstitutional in not providing a jury trial, saying, *ib.* 64, "It plainly appears, from the whole scope and tenor of the Constitution and Act of Congress, that the fugitive was to be delivered up on a summary proceeding, without the delay of a formal trial in a court of common law." To this Judge Tilghman adds a statement which, in subsequent instances, has been enlarged upon as a judicial denial of the assertion that a delivering up of an alleged slave to the claimant under the statutes of 1793 and 1850 is a determination of the rights of the parties under the national law without the test of a trial by jury. The judge said: "But if he had really a right to freedom, that right was not impaired by this pro-

<sup>1</sup> The question remains—whether these guarantees do not modify whatever power private persons may derive from the Constitution, and so limit the rights given by the fugitive-slave provision to the owner. This is subordinate to the question of the construction of that provision, because it can only arise on adopting the fourth construction. This question has not been here examined, because, on other reasoning, the conclusion has been against the doctrine that the owner's right in respect to the fugitive is the same as in the State from which he escaped. See *ante*, p. 580, n. 1. In 9 Oh., 173, Mr. Wolcott argues that these guarantees do apply against seizure and removal by the claimant.

<sup>2</sup> In *Butler v. Hopper* (1806), 1 Wash. C. C., 500, *ante*, p. 409, *Commonw. v. Holloway* (1816), 2 S. & R., 305, *ante*, p. 412, and *Ex parte Simmons* (1823), 4 Wash. C. C., 396, *ante*, p. 409, the question was only of the personal extent of the provision, and the party claimed was not delivered up. In *Glen v. Hodges* (1812), 9 Johns., 67, *ante*, p. 438, the question was only of the right to seize, either for removal or making a claim; the debt of service seems not to have been disputed. But the court may have thought that the question at issue involved the constitutionality of the entire Act.



ceeding; he was placed just in the situation in which he stood before he fled, and might prosecute his right in the State to which he belonged." But this admission that the person claimed as a fugitive from labor is, by the operation of the Act, "placed just in the situation in which he stood before he fled," is, in itself, a recognition that the rights of the parties *under the national law* are decided without the test of a trial by jury. The utmost effect that can be given to the owner's claim *under the provision* is to place the fugitive just in the situation in which he stood before he fled.<sup>1</sup>

§ 922. In *Jack v. Martin* (1834), 12 Wend., 311-14, *ib.* 507 (*ante*, p. 446), the question of the constitutionality of the Act of Congress was involved, as well as that which was principally examined by the Supreme Court, viz., whether the State had either exclusive or concurrent power to legislate in carrying the constitutional provision into effect. The constitutionality of the Act of Congress, in respect to the guarantee of jury trial, appears to have been fully discussed on the argument, or, at least, on the argument before the Court for the Correction of Errors; see 14 Wend., 515, 521. But, in the opinion of the court below, little notice was taken of the question, and the Court for the Correction of Errors declined to express any opinion on the constitutionality of the Act of Congress. Judge Nelson's language, even in supporting the legislation of Congress, is, in this connection, very remarkable. He said, 12 Wend., 324: "It has been said that, under the law of 1793, a free citizen might be seized and carried away into captivity, and hence the necessity of the law of the State giving him a trial by jury upon the question of freedom. This argument is

<sup>1</sup> In *Hill v. Low* (1822), 4 Wash. C. C., 327, the action was for the penalty for obstructing the plaintiff in arresting the supposed fugitive for the purpose of bringing him before a magistrate; *ante*, p. 630. In *Commonwealth v. Griffith* (1823), 2 Pick., 11, the question was only of the right of seizure without a warrant. The arguments of Judges Parker and Thacher on that point have, however, a bearing on the present question; see *ante*, p. 552. In *Worthington v. Preston* (1824), 4 Wash. C. C., 461, the action was against the jailor for escape of a slave placed in his custody by a claimant, who had obtained a certificate under the statute. But, as the jailor was held not responsible, the validity of such a certificate was not affirmed; *ante*, p. 630. In *Fanny v. Montgomery* (1828), 1 Breese, 188, there was no decision bearing on this question; *ante*, p. 631, note. In *Johnson v. Tompkins* (1833), 1 Bald. C. C., 571, there was no certificate on claim, and the rights of the parties were determined by the State law, or by the provision in the Constitution, irrespectively of the Act of Congress. See *ante*, p. 441.

plausible, and the justice of it difficult to deny; but, sound as it is, it tends only to prove the defectiveness of the law of Congress, not the authority of the State. It would be appropriate and pertinent, when urged before that body, to effect an amendment of the law; but it would be a most sweeping and dangerous position, if sufficient to justify the authority to amend it by State legislation." Judge Nelson here seems to hold that a court may admit that an Act of Congress is unconstitutional, and yet recognize the legality of the action prescribed by that Act, because the State has no power to supply deficiencies in the legislation of Congress. In his further answer to the same objection (after an argument from the undisputed surrender of fugitives from justice) Judge Nelson seems to argue that a State judge should not examine into the validity of an Act of Congress, because the national judiciary has the power to correct injustice or error committed by the subordinate court or magistrate who, in the first instance, is called upon to apply the law of Congress. He says, 12 Wend., 325: "If the magistrate should finally err in granting the certificate, the party can still resort to the protection of the national judiciary. The proceedings by which his rights have been invaded being under a law of Congress, the remedy for error or injustice belongs peculiarly to that high tribunal.<sup>1</sup> Under their ample shield, the apprehension of captivity and oppression cannot be alarming." According to this reasoning, the State judiciaries should never examine into the validity of an Act of Congress.

In his Opinion, in the Court for the Correction of Errors, Chancellor Walworth assumed, as admitted, that the negro claimed in this case did owe service, and had escaped. But he said, 14 Wend., 525: "But suppose, as is frequently the case, that the question to be tried relates merely to the identity of the person claimed as a fugitive slave or apprentice, he insisting that he is a free, native-born citizen of the State where

<sup>1</sup> How is this assertion consistent with the doctrine that the magistrate exercises special authority, see *ante*, pp. 618, 619, notes; or with the doctrine of *Barry v. Mercein*, 5 Howard, 103, that no appeal lies to the Supreme Court from a decision on habeas corpus, in the Circuit Court, or that of *Metzger's case*, *ib.* 176, that no appeal lies from a decision of a judge at chambers?



he is found residing at the time the claim is made, and that he has never been in the State under whose laws his services are claimed,—can it for a moment be supposed that the framers of the Constitution intended to authorize the transportation of a person thus claimed to a distant part of the Union as a slave upon a mere summary examination, before an inferior State magistrate,<sup>1</sup> who is clothed with no power to compel the attendance of witnesses to ascertain the truth of the allegations of the respective parties? Whatever others may think upon the subject, I must still be permitted to doubt whether the patriots of the Revolution who framed the Constitution of the United States, and who had incorporated into the Declaration of Independence, as one of the justifiable causes of separation from our mother country, that the inhabitants of the colonies had been transported beyond seas for trial, could ever have intended to sanction such a principle as to one who was merely claimed as a fugitive from servitude in another State.”

§ 923. The decision of Judge Thompson in the matter of Peter, alias Lewis, Martin (circa 1837), 2 Paine's C. C. R., 348, was on a motion to quash writs *de homine replegiando*, issued out of and made returnable in the United States Circuit Court, requiring the marshal to replevy Martin out of the custody in which he was held by certain citizens of Virginia. The marshal had replevied Martin when held by the sheriff under a *habeas corpus* issued by the Recorder of the City of New York, conformably to the State law.<sup>2</sup> But the Recorder had afterwards given a certificate to the claimants. Judge Thompson held that, whether Martin was “in the custody of the law under the order of the Recorder, or was in the custody of the

<sup>1</sup> As already shown, *ante*, p. 652, the previous decisions did not warrant the Chancellor in saying that an inferior State magistrate—that is, one not holding the ordinary judicial power of the State—may act as provided in the Act of Congress. This dictum of the Chancellor is in harmony with the passage already quoted, in which he describes the power exercised by the State magistrates as ministerial. See *ante*, p. 632.

<sup>2</sup> The portion of Judge Hornblower's Opinion in Himsley's case (1836) which relates to the constitutionality of the law of New Jersey in respect to the guarantee of jury trial in the State Constitution (*ante*, p. 66, n.) indicates that he considered the objection of great force as against the Act of Congress also.

<sup>3</sup> Like Judge Nelson, on similar circumstances in *Jack v. Martin* (*ante*, p. 622, n.), Judge Thompson held that the Recorder had proceeded throughout under the law of Congress.

claimants," the writ was irregularly issued, and must be set aside. (Ib. 351, 355.)

Judge Thompson held that, if the Act of Congress were unconstitutional and void, there would be no objection to issuing a *hominis replegiando* to try the question of slavery (ib. 351). But he affirmed the constitutionality of the law of Congress, and considered the objection taken against it for not permitting trial by jury. On this point he is reported to have said (ib. 352): "If the inquiry before the magistrate was a trial upon the merits, and conclusive upon the question of slavery, there would be great force in the objection. But it is not. It is only a preliminary examination to authorize the claimant to take back the fugitive to the State from which he fled; and the question, whether he is a slave or not, is open to inquiry there, and we cannot listen for a moment to any suggestion that this question will not be there fairly and impartially tried." And, on p. 353: "If this were intended to be a final determination of the question of slavery, the law would, doubtless, have declared the freedom of the slave to be thereby established; and it would be a judicial proceeding which would, under the Constitution of the United States, be binding in each State. The magistrates designated in the Act, who are authorized to entertain this inquiry, clearly shows it would not be intended as a trial upon the merits of the case. It may be made before any judge of the Circuit or District Courts of the United States residing or being within the State, or before any magistrate of a county, city, or town corporate, wherein such seizure or arrest shall be made.<sup>1</sup>

"The 7th article of the Amendments to the Constitution does not apply to any such preliminary inquiries. \* \* \* Admitting that the trial upon the merits, under the *hominis replegiando*, or any other mode of proceeding which is final upon the question of slavery, would fall within this amendment, and would require a trial by jury, it by no means follows that, for the purposes contemplated by this Act of Con-

<sup>1</sup> The argument is, that some persons might act who neither held the judicial power of the United States, nor were judges of State courts of ordinary jurisdiction. But this, as has been shown, has never been established by judicial decision.



gress, the right of trial by jury is secured.<sup>1</sup> If it is, it is secured in every case where a fugitive from justice is demanded according to the provisions of the same Act of Congress; and, indeed, it is secured in every possible case of arrest upon a criminal charge—for the identity of the person and *prima facie* evidence of guilt are subjects of inquiry upon every such arrest. But another reason may be assigned why this Amendment has no bearing upon the law in question: the right of trial by jury secured by this Amendment is the trial according to the course of the common law, and is confined to matters of fact only. All questions of law arising upon suits at common law are decided by the court; and the inquiry before the magistrate, under this Act of Congress, so far as the question of slavery is involved, is a question of law, and not a question of fact. The magistrate is to inquire whether, *under the laws* of the State or Territory from which the fugitive fled, he owes service or labor to the person claiming him."

In this view of the nature of the issue, Judge Thompson appears to have stood alone. No other judge has said anything to support this extraordinary position.

§ 924. In Prigg's case no allusion was made either by counsel or by any member of the court to this ground of objection against the constitutionality of the Act.<sup>2</sup> The judgment of the court in this case bears on the present question only on the supposition that the constitutional guarantee cannot apply against a removal of the supposed fugitive under the proceedings instituted by the law of Congress any more than it would against the act of the claimant in seizing and removing such fugitive without reference to the remedy provided by Congress. The

<sup>1</sup> For the defendant in error, in *Jack v. Martin*, 14 Wend., 521, shortly after this decision, O'Connor, counsel, in reply to the objection against the Act of Congress which is here considered, asserted that the person claimed may try his right to freedom by *homine replegiando* in the Circuit Court of the United States. This opinion has not been advanced in any other case under the law of 1793. It seems inconsistent with the conclusiveness of the certificate declared by sec. 6 of the Act of 1850.

<sup>2</sup> On the question, whether the judgment of the court involved the inquiry into the constitutionality of the Act of Congress, see *ante*, p. 638, note. Mr. W. W. Story, in *Life and Letters of Judge Story*, vol. 2, 396, says, that when the objection to the constitutionality of the Act of Congress for excluding a jury trial was suggested to Judge Story, "on his return from Washington, he replied that this question was not argued by counsel nor considered by the court, and that he should still consider it an open one."

court in *Prigg's* case affirmed the *legality* of such a removal by the claimants. An argument *against* that doctrine has already been presented. But, admitting the validity of such removal, it would still seem that, if Congress undertakes to provide a mode of determining the claim under its authority, it must respect this guarantee, which is intended to limit all powers of the national Government in reference to private persons. It seems to be admitted, by those who maintain the claimant's right to seize and remove the fugitive, that personal replevin or trespass may be brought against such claimant in the State in which the person seized is found: in which case his right to the service of the person seized will be tried by jury. But the Acts of Congress prevent any such means of contesting the claimant's right, and thus exclude even that trial which might take place consistently with the doctrine of seizure and removal.

§ 925. In *Sims' case*, 7 Cushing, 310, Shaw, Ch. J., says:—"Since the argument in court this morning I am reminded by one of the counsel for the petitioner that the law in question ought to be regarded as unconstitutional, because it makes no provision for a trial by jury. We think that this cannot vary the result. The law of 1850 stands, in this respect, precisely upon the same ground with that of 1793, and the same grounds of argument which tend to show the unconstitutionality of one apply with equal force to the other, and the same answer may be made to them." This is the only notice of the objection in this opinion.

§ 926. In *Miller v. McQuerry* (1853), 5 McLean, 469, Judge McLean supported the validity of the Acts of Congress against this objection by a specimen of reasoning which would be deemed extraordinary indeed if applied to any other matter than the claim for a fugitive slave. The judge says, *ib.* 481: "The Act of 1850, except by repugnant provisions, did not repeal the Act of 1793. The objection, that no jury is given, does apply to both Acts. From my experience in trying numerous actions for damages against persons who obstructed an arrest of fugitives from labor, or aided their escape, I am authorized to say that the rights of the master would be safe before



a jury." The judge gives an instance where an abolitionist was of the jury.<sup>1</sup> He afterwards says: "The Act of 1793 has been in operation about sixty years. During that whole time it has been executed as occasion required, and it is not known that any court, judge, or other officer, has held the Act in this or in any other respect unconstitutional. This long course of decision on a question so exciting as to call forth the sympathies of the people and the astuteness of lawyers is no unsatisfactory evidence that the construction is correct.

"Under the Constitution and Act of Congress the inquiry is not strictly whether the fugitive be a slave or a freeman, but whether he owe service to the claimant. This would be the precise question in the case of an apprentice; in such a case the inquiry would not be whether the master had treated the apprentice so badly as to entitle him to his discharge. Such a question would more probably arise under the indenture of apprenticeship and the laws under which it is executed. And if the apprentice be remanded to the service of his master, it would in no respect affect his right to a discharge, where he is held, for the cruelty of his master or any other ground.<sup>2</sup> The same principle applies to fugitives from labor. It is true in such cases evidence is heard that he is a freeman. His freedom may be established, by acts done or suffered by his master, not necessarily within the jurisdiction where he is held as a slave. Such an inquiry may be made, as it is required by the justice of the case.<sup>3</sup> But on whatever ground the fugitive may be remanded, it cannot, legally, operate against his right to liberty. That right when presented to a court in a slave State has, generally, been acted upon with fairness and impartiality. Exceptions to this, if there be exceptions, would seem to have arisen on the claims of heirs or creditors, which are governed

<sup>1</sup> The assurance that under either system of trial the result to him must be the same, might be very satisfactory to the person claimed, but it is a very singular mode of disposing of the legal question. There is in it as much argument for as against trial by jury.

<sup>2</sup> The judge argues—the question, whether the person claimed is or is not an apprentice, cannot be tried, because, *assuming that he is an apprentice*, a discharge of the indentures, for cruelty, &c., could be asked for only in the State in which the parties reside.

<sup>3</sup> This is inconsistent with that which he had just said of an apprentice.

by local laws, with which the people of the other States are not presumed to be acquainted.<sup>1</sup>

"If a fugitive from labor, after having been liberated by a judge or commissioner, should voluntarily return to his master, southern courts would have held that his original status would attach to him; he would be held as a slave. And, of course, the decision of the judge or commissioner, having been that he did not owe service to the claimant, could not operate as a bar to the rights of the master. The claim to freedom, if made in the slave State, would be unaffected by the preliminary inquiry and decision.<sup>2</sup> That decision is, that the slave does or does not owe service to the claimant. It does not finally establish the fact, whether the fugitive is a freeman or a slave. If the decision on such an inquiry as this should finally fix the seal of slavery on the fugitive, I should hesitate long, notwithstanding the weight of precedent, without the aid of a jury, to pronounce his fate. But the inquiry is preliminary, and not final.

"It is true, it may be said, that the power of the master may be so exercised as to defeat a trial for the freedom of the fugitive. This must be admitted; but the hardship and injustice supposed arise out of the institution of slavery,<sup>3</sup> over which we have no control. Under such circumstances we cannot be held answerable.

"It may be said that the seventh Article does not apply to a case like this. The provision is 'in suits at common law.' This is not strictly a proceeding at common law. The common law is opposed to the principle of slavery. The proceeding is under constitutional and statutory provisions, under the forms specially provided, and not according to the course of common law."

§ 927. In Booth's case (1854), 3 Wisc. 39, Judge Smith, in

<sup>1</sup> The judge declares his ignorance of the judicial proceedings to which the commissioner's decision is supposed to be preliminary.

<sup>2</sup> To what is the commissioner's decision *against* the claim preliminary? The slave's voluntary return seems to be the real preliminary to the judgment in the slave State, in the case supposed.

<sup>3</sup> The judge contemplates the consequences of the institution of slavery attaching to a person whom he had before distinguished as not being declared a slave, but only a person owing service.



his first Opinion, says, immediately after the passage cited, *ante*, p. 670:

"It has been already said that, until the claim of the owner be interposed, the fugitive in this State is, to all intents and purposes, a free man.

"The interposition of the claim, by legal process, is the commencement of a suit. 'A suit is the prosecution of some claim, demand, or request.' 6 Wheat. 407. The trial of such claim is the trial of a suit. Therefore the trial thereof must not only be had before a judicial tribunal, but whether proceedings be commenced by the fugitive to resist the claimant, or by the claimant to enforce, and establish his claim, it [40] would seem that either party would be entitled to a jury. It is no answer to this position to say that neither the States nor the general Government have provided means for such a mode of trial. The constitutional right of the party remains the same. The late organization of our county courts failed to provide a trial by a constitutional jury, yet the Supreme Court held that parties were nevertheless entitled to demand it. If provision is not made for such a trial, it is the duty of the proper authority to make it. Nor is it any answer to this position to say, that the proceeding to reclaim and repossess a fugitive from service is not a 'suit at common law.' This question is already settled. It has been judicially determined that the term 'common law' was used in the Constitution in contradistinction to suits in admiralty or equity. Were it otherwise, Congress need only to change the common-law form of procedure to nullify the right of trial by jury in all cases. See Story Comm. 645, et seq.; 3 Pet. 446.

"Mr. Justice Story says, 'in a just sense, the amendment may well be construed to embrace all suits which are not of equity or admiralty jurisdiction, whatever may be the peculiar form which they may assume, to settle legal rights.' We have already seen that the legal right of the claimant must be settled before a fugitive from labor can be delivered up. We have already seen that a *suit* is held to be 'the prosecution of some claim, demand, or request.' The conclusion seems to be irresistible, therefore, that the prosecution of the claim to a

fugitive from labor, or resistance to such claim by legal proceedings on the part of the fugitive, is a *suit*, not in equity or admiralty, and hence at common law, within the purview [41] of the Constitution. Of course I do not pretend to say that such a proceeding is technically a suit at common law; nor is a proceeding by foreign attachment, and many other proceedings which are held to be embraced by the jury provision of the Constitution. Authorities might be multiplied on this subject, were it necessary.

"Again, it is said that the Constitution evidently contemplates a summary mode of proceeding in the case of a fugitive from labor. Where is the evidence of it? Nothing of the kind is found in the history of the provision, nor in its pathway to the Constitution. Nothing of the kind is apparent from the language used; for it distinctly imports a trial of the claim, and a determination of the fact that labor or service is due to the claimant before a delivery can be made. When the evidence of such an intention is furnished, there will be time enough to trample down all forms of law, and set at naught every settled rule of construction. But, admit the fact. A provision may be made for obtaining a jury in a summary manner, as is sometimes done for the trial of the right of property seized by attachment. But I can pursue this subject no further.

"Again, the Constitution provides that no person shall be deprived of life, liberty, or property, without *due process of law*. This last phrase has a distinct technical meaning, viz.: regular judicial proceedings, according to the course of the common law, or by a regular suit commenced and prosecuted according to the forms of law. An essential requisite is due process to bring the party into court. It is in accordance with the first principles of natural law. Every person is entitled to his 'day in court,' to be legally [42] notified of the proceedings taken against him, and duly summoned to defend. The passing of judgment upon any person without his 'day in court,' without due process, or its equivalent, is contrary to the law of nature, and of the civilized world, and, without the express guaranty of the Constitution, it would be implied as a funda-



mental condition of all civil governments. But the tenth section of the Act of 1850 expressly nullifies this provision of the Constitution. It provides that the claimant may go before any court of record, or judge, in vacation, and, without process, make proof of the escape, and the owing of service or labor; whereupon a record is made of the matters proved, and a general description of the person alleged to have escaped; a transcript of such record, made out and attested by the clerk with the seal of the court, being exhibited to the judge or commissioner, must be taken and held to be conclusive evidence of the fact of escape, and that service or labor is due to the party mentioned in the record, and *may* be held sufficient evidence of the identity of the person escaping.

"Here is a palpable violation of the Constitution. Can that be said to be by due *process* of law which is without process altogether? Here the *status* or condition of the person is instantly changed in his absence, without process, without notice, without opportunity to meet or examine the witnesses against him, or rebut their testimony. A record is made, which is conclusive against him 'in any State or Territory in which he may be found.' It is not a process to bring the person before the court in which the record is made up, but it is, to all intents and purposes, a judgment of the court or judge, which commits the person absolutely to the control and possession of the claimants, to be taken whithersoever he pleases, to be dragged from a State where the legal presumption is in favor of his freedom to any State or Territory where the legal presumption is against his freedom.

"Is not this depriving a person of liberty without due process of law? Other courts and other judges may pronounce this provision of the Act of 1850 to be in conformity with that provision of the Constitution which declares that no person shall be deprived of life, liberty, or property, without due process of law; but, while I have a mind to reason, and a conscience to dictate me, and an oath to support the Constitution of the United States resting upon my soul, I cannot so declare it, and, for the price of worlds, I will not.

"Upon this branch of that Act I am not aware that there

has been any adjudication. Certainly there has been none that can be claimed as authority here. The same may be said in regard to the trial by jury. There are other points equally fatal to this Act when tested by the Constitution, but I have not time nor inclination now to discuss them."

§ 928. Chief Justice Whiton, delivering the opinion of the court on the *certiorari*, said, 3 Wisc. 62, 63, that, in the discussion of Prigg's case, "nothing was said of the right of the alleged fugitive to a trial by jury to decide the question of fact upon which his surrender depends;" and that there was nothing on the point in the other cases before the Supreme Court—*Jones v. Van Zandt*, 5 How., and *Moore v. Illinois*, 14 Howard; adding: "We are of opinion, therefore, that, whatever may be the duty of this court in relation to the question of the power of Congress to provide by law for the surrender of fugitives from labor to the persons to whom their labor is due, we are not at liberty to consider the question of the right of a person claimed as a fugitive to a trial by jury before he can be surrendered or delivered up to the claimant as already settled by the court which has the power finally to decide all questions growing out of an alleged violation of the Constitution of the United States by an Act of Congress. We must consider the question as an open one."

Then, after the extract already given (*ante*, pp. 670, 671), which relates to the power exercised by the commissioners, Judge Whiton says, 3 Wisc., 66: "And we think it equally clear that the Constitution is violated by withholding from the person claimed the right to a trial by jury before he can be delivered up to the claimant."

"The fifth article of Amendments to the Constitution of the United States provides, among other things, that 'no person shall be deprived of life, liberty, or property, without due process of law.' Chancellor Kent, in his Commentaries (2 Kent. Com., 3), says: 'It may be received as a self-evident proposition, universally understood and acknowledged throughout this country, that no person can be taken or imprisoned, or dis-seized of his freehold, or liberties or estate, or exiled, or condemned, or deprived of life, liberty, or property, unless by the



law of the land, or the judgment of his peers. The words, law of the land, as used in *Magna Charta* in reference to this subject, are understood to mean due process of law; that is, by indictment or presentment of good and lawful men; and this, says Lord Coke, is the true sense and exposition of these words.'

"[67] We are aware that it has been said that slaves are not persons in the sense in which that term is used in the Amendment to the Constitution above referred to. But this, admitting it to be true, does not affect the question under consideration, as persons who are free are liable to be arrested and deprived of their liberty by virtue of this Act, without having had a trial by a jury of their peers. We do not propose to discuss the question, whether a slave escaping from the State where he is held to service or labor, into a State where slavery does not exist, thereby becomes free by virtue of the local law, subject only to be delivered up to be returned again to servitude, as it is a question not necessarily involved in the consideration of the subject before us. But we propose to examine the operation of the Act upon a free citizen of a free State, and to show that by it such a person may be deprived of his liberty without 'due process of law.' It will be observed that the claimant can go before any court of record, or any judge thereof, in vacation, and make satisfactory proof to such court or judge, in vacation, of the escape, and that the person escaping owes service or labor to such party. It then becomes the duty of the court to cause a record to be made of the matters so proved, and also a description of the person escaping, and such record, being exhibited to any judge, commissioner, or other officer authorized by law to cause persons escaping from service or labor to be delivered up, shall be held and taken to be conclusive evidence of the fact of escape, and that the service or labor of the person escaping is due to the party in such record mentioned. This testimony is taken, and this record is made, in the absence of the person to be affected by the proceeding. He has no [68] opportunity to cross-examine the witnesses who depose to the facts which are thus conclusively proved; but without his knowledge evidence is manufactured,

which, by virtue of this Act, proves beyond question that he is a slave and that he has escaped from servitude. We are at a loss to perceive how this proceeding, by virtue of which a freeman becomes a slave, can be justly called 'due process of law,' in the sense in which that language is used in the Constitution. We are aware that it has been said that the proceedings before the commissioner do not determine the question of freedom or slavery, that the fugitive is only sent back to the State from which he is alleged to have escaped, and that when he reaches there he is a freeman or a slave as his *status* shall be determined by the local law. It is further said that these proceedings are analogous to those by which the fugitive from justice is delivered up to be taken to the State from which he has escaped; that a person may be arrested by virtue merely of an indictment or an affidavit made before a magistrate, charging him with treason, felony, or other crime committed in some other State, and that upon the production of a copy of the indictment or affidavit certified as authentic by the governor or chief magistrate of the State or Territory from which he had fled, he shall be delivered up to be taken back. It is said that as this proceeding does not deprive the person of his liberty in the sense in which that term is used in the Constitution, but merely delivers him up to be taken to the State where, according to the indictment or affidavit, the offence was committed, to be dealt with according to the local law, so, neither do these proceedings accomplish more than the mere transfer of the alleged fugitive [69] to the State where, as is claimed, he owes service or labor by force of the local law. We think this a mistaken view of the question. The fugitive from justice is delivered to an agent appointed by the governor of the State where the offence is alleged to have been committed, without any adjudication upon the question of his guilt or innocence; in other words, he is delivered to the officer of the law, and is in the custody of the law for the purpose of being taken to the State where alone he can be tried for the alleged offence. But the case is very different with the alleged fugitive from labor. In his case there is an adjudication before the commissioner that he owes service or labor, and that



he has escaped. By force of the Act of Congress under consideration, the record made in the State from which he is said to have escaped is conclusive evidence that his *status* is that of a slave.

"The commissioner is obliged, if his identity is proved, so to adjudge, and the certificate which is given to the claimant is given because the commissioner has so adjudged. Moreover, the commissioner can only give the certificate to the claimant, who must be the person to whom the labor or service is due, his agent or attorney, and it is given to him for that reason. It is not material to inquire what the condition of the person will be when he has been taken to the State where the service or labor is said to be due. He may regain his freedom; but, if he does, it will be by force of the law of the State, and not by virtue of the Act of Congress under consideration; for under that he has been adjudged a slave, and by force of it he has been taken as a slave by the person adjudged to be his owner, his agent or attorney, from the State where he was arrested, to the State from which he is alleged [70] to have escaped. We are, therefore, obliged to conclude that the alleged fugitive from labor is taken back to the State from which he is said to have escaped, as a person who has been proved and adjudged to be a slave, and, as we believe, without due process of law, without having his rights passed upon and determined by a jury of his peers. We think it essential that his right should be maintained by all courts and all tribunals, and for the reasons above given we must affirm the order made in this case, discharging the relator."

§ 929. The remarks of Judge Crawford, 3 Wisc., 83-85, dissenting from his associates on the question of the validity of the Act of Congress in this respect, are given in the note.<sup>1</sup>

<sup>1</sup> 3 Wisc., 83:—"The right of trial by jury is highly and justly esteemed, and is expressly protected and preserved by our State constitution; and it cannot be denied that this right extends to all persons within the State, regardless of color, and to the fugitive from labor or slavery as to the freeman, in all that relates to or affects his life, liberty, or property, subject to the several provisions of the Constitution of the United States. But suppose that a demand by the executive of any other of the States of this Union upon the Governor of this State has been made, to surrender any citizen, whether he be white or black, upon a charge of felony committed in the State from which the requisition comes. It may be that, as in the case of an unfounded claim upon the labor and service of the alleged

They are only a repetition of the arguments advanced in earlier cases.

§ 930. In the cases of Bushnell and Langston, 9 Oh., 177, this question was not considered material by the majority of the court. Judge Swan does not examine it at all. Judge Peck, immediately after a passage already cited,<sup>1</sup> in which he affirms the question immaterial in that case, asks (*ib. p. 213*): "But is it true that those provisions are so clearly unconstitutional as to authorize this court to pronounce them, and the law in which they are incorporated, invalid? This is certainly not the case if the repeated decisions of the Supreme Court of the United States," &c., referring to *Prigg's case* and *Booth's case*. "Nor are we," he adds, "without decisions of the highest State tribunals to the same effect," citing particularly the words of Judge Tilghman in 5 S. & R., and Judge Shaw's opinion in *Sims' case*, and mentioning other cases, together with 2 Story's

fugitive slave, the person demanded as a fugitive from justice ought not to be delivered over; and yet, if the requisition be in due form of law, and accompanied by the proper evidence that the person is charged with the offence, the right of trial of the fact is not afforded to him here; but he is apprehended, deprived of his liberty, and transported to another and perhaps a distant State for trial. Could this be done except by virtue of a provision of the Constitution, or a treaty? There would seem to be no real difference between the demand of a fugitive from justice, and the claim of a party to whom it is alleged labor or service is due.

"In either case there is a deprivation of personal liberty without the intervention of a jury; but it is considered essential to the complete enforcement and fulfillment of the constitutional compact, that a temporary deprivation should be permitted in the individual case, in order that the constitutional right may be secured. It is true that, in the case of a fugitive from justice, he is given into the custody of the officers of justice, with the beneficent presumption of the law in favor of his innocence, until he shall have been duly convicted; while, in the case of the fugitive from labor, he is placed under the control of his claimant, to be carried back to the State from which he is charged to have fled, with no presumption in favor of his freedom; but this is, I think, more an argument against the policy and justice and humanity of the law, than against its constitutionality. A case might arise where, by false swearing and conspiracy, a freeman, by the machinery of this law, might be snatched from his liberty and reduced to the condition of slavery, until, by a suitable proceeding, he asserted and obtained his freedom; but so, also, by similar means, an innocent man may be carried away, charged with crime, and placed under the necessity of vindicating his innocence in a distant State."

Here the judge cites from Story's Commentaries, and from Sergeant's Constitutional Law, the passages which are given *post*, § 932. He then adds:

"Assuming that the framers of the Constitution had in view the cases of fugitive slaves only, and that their object was to secure the delivering up of such fugitives on claim of the owner or person to whom the labor is due, it would seem obvious that, if a trial by jury may be insisted upon, the determination of the question might be protracted in various ways, so as to defeat the very object of the constitutional provision."

<sup>1</sup> *Ante*, p. 569.



Comm., §§ 1811, 1812, and Sergeant on Const. Law, 398, as sustaining the validity of the law against this objection. Judge Peck relied apparently on this authority entirely.

Judge Brinckerhoff, in his dissenting opinion, does not discuss this point. On page 222 of the report he says, however, that the person who had been rescued had been "deprived of his liberty without due process of law," contrary to the fifth Amendment.

Judge Sutliff, on page 246, referring to the same Amendment, argues that "the phrase was understood then, as it had long before and has ever since been understood, to mean, in its legal acceptation, a suit instituted and conducted according to the prescribed forms and usages of courts of justice for ascertaining guilt and determining title. No one then understood, and no one now understands, the phrase to be of less comprehensive import."

"Article 7," he adds, "provides that in suits at common law, when the value in controversy shall exceed twenty dollars, the right of trial by jury shall be inviolate. And it may properly be held that a person's claim to his liberty, or a claim for his future services for life, is a claim of sufficient magnitude to give the right of trial by jury under this provision of the Constitution.

"Previous to and at the time of the adoption of the Constitution it is said that the common-law writ, *de homine replegiando*, for the purpose of trying the right of the master to the service of the slave, was well known to the laws of the several States, and was in constant use for the purpose, except so far as it had been superseded by the more summary proceeding by habeas corpus or by local legislation.

"If, then, it should be said that the provision in the Constitution, 'no person held,' &c., contemplated a summary surrender and extradition, the answer is at hand. In the first place, there is nothing in the language of the provision, or in its subject matter, contemplating a summary proceeding; but, on the contrary, from the language and object of the provision, it is evident that no surrender is promised or contemplated by the provision until the case provided for is shown; that is: 1st.

That the person claimed was held to service or labor under the laws of another State. 2d. That such service or labor is due to the party claiming to have the person delivered up. And, 3d. That the person so held to service under the laws of such State had escaped therefrom, and all presumptions of law being in favor of life and liberty, and the claim for surrender being a claim against liberty, it must be fairly proved.

"Again, the Amendment of the Constitution referred to, being an amendment of the instrument containing the fugitive clause relied on, must have full effect, although it be by qualifying, or even by necessary implication, entirely abrogating that provision requiring a surrender. There is not, however, any irreconcilable incongruity between the fugitive clause reasonably interpreted and the Amendment. The Amendment only makes certain what ought to have been before regarded as reasonably implied—that neither under that clause of the Constitution, nor any other, can a person be deprived of his liberty, except by due process of law, and that the person against whom the claim is made has a right to a jury trial and all the ordinary facilities of a court of justice constituting due process of law."

Judge Sutliff here cites the language of Kent, 2 Comm. 3, already given in the extract from Judge Whiton's opinion, *ante*, p. 712. He then adds: "The object of the fugitive Act is not to surrender a criminal for his trial in another State, but to surrender a person on the claim of another person, that the person claimed is his debtor, that he owes him, not money, but services." For the provision, he remarks, includes apprentices.<sup>1</sup> "It is also to be remembered," he adds, "that the provisions of the Act of 1850 are as general and comprehensive as any other general law, in its terms." He gives section 10 of the Act, at length. On p. 250, supposing the case of one being seized who is actually a native domiciled free white citizen of the State, he says:—"Now can it be gravely insisted that a free white man or woman, thus arrested, under no charge of any crime or offence in the foreign State, but merely charged with owing service and denying the claim, is not entitled to a fair trial by

<sup>1</sup> On this question see *ante*, § 715.



jury, and to the benefit of due process of law, to make good his or her defence? If such right does not exist under the express provision of the Constitution in such a case, in what imaginable case can a free citizen of a free State assert his claim to a due process of law, or a jury trial, to show a legal defence to any unjust claim against him,—to show he does not *owe service* or money, or any other debt or demand, claimed of him by another person, and upon which he had been arrested?"

§ 931. The next authorities in the order herein already followed are the opinions delivered by U. S. commissioners. In the note<sup>1</sup> below is given a portion of Mr. George T. Curtis' Opinion, which immediately follows the extract given, *ante*, p. 676, note. Mr. Loring did not examine this question in his opinion delivered in Burns' case.

§ 932. On this question there is very little to be gleaned from the commentators. Story, in Comm., 1st ed., § 1806, 2d ed., § 1812, says: "It is obvious that these provisions for the arrest and removal of fugitives of both classes contemplated summary ministerial proceedings, and not the ordinary course

<sup>1</sup> IV. Mon. L. R. 7:—"The rendition of fugitives from service under the Constitution is an act analogous to the rendition of fugitives from justice, and the two cases, so far as the powers and duties of the General Government are concerned, are of the same general character and may appropriately be provided for by the same general means. The purpose of proving in the one case that the person claimed was held to service and has escaped, and in the other that he had committed a crime, is simply to establish the right of removal. Nor does the fact that the fugitive from service is surrendered to his owner, while the fugitive from justice is surrendered to the State, have a tendency to show that the proceedings here, in either case, are a trial of anything more than the right of removal. In both cases the Government of the United States surrenders the fugitive, or provides for his surrender, to the party to whom it has stipulated that he shall be delivered up. In the case of fugitives from service, there may be practical difficulties or improbabilities as to a trial after a fugitive has returned. But the Government of the United States, in making the surrender which it has stipulated to make, is not constitutionally bound to stipulate for a trial, and its omission to do so does not make these proceedings final and conclusive, instead of ministerial. There may be, on the other hand, practical means and provisions well known to be made by the slave States for trying these questions of freedom by process instituted for the express purpose. The General Government has as clear a right to look to one class of probabilities as to the other. Its looking to the one and not to the other, does not make its own proceedings, clearly designed to be ministerial and to secure only the limited right of removal, a full and final trial of a right which it obviously intends to leave to another government to adjudicate, upon the faith that it will do justice to its own subject. If this be so—and there is no doubt that it is—this proceeding is not a suit at common law in which either party can, as a matter of right, demand a trial by jury. The decision of the Supreme Court of the United States in *Prigg's case*, that the law of 1793, which also withheld a trial by jury, is constitutional in all its leading provisions, fully disposes of this question."

of judicial investigations, to ascertain whether the complaint be well founded, or the claim of ownership be established beyond all legal controversy. In cases of suspected crimes, the guilt or innocence of the party is to be made out at his trial, and not upon the preliminary inquiry, whether he shall be delivered up. All that would seem, in such cases, to be necessary, is, that there should be *prima facie* evidence before the executive authority to satisfy its judgment, that there is probable cause to believe the party guilty, such as upon an ordinary warrant would justify his commitment for trial. And, in the cases of fugitive slaves, there would seem to be the same necessity of requiring only *prima facie* proofs of ownership, without putting the party to a formal assertion of his rights by a suit at the common law. Congress appear to have acted upon this opinion, and accordingly, in the statute upon this subject, have authorized summary proceedings before a magistrate, upon which he may grant a warrant for removal."

This passage occurs in Story's exposition of the provision itself. He does not refer to the question which arises on a comparison of the Acts of Congress with the guarantee in the Amendment, and does not offer to show, by any interpretation or construction, that this view was "contemplated." He merely cites the earlier authorities.

In Sergeant's Constitutional Law, 1st ed., 387, 2d ed., 398, the author says on this point only: "From the whole scope and tenor of the Constitution and Act of Congress, it appears that the fugitive is to be delivered up on a summary proceeding, without the delay of a formal trial in a court of common law."<sup>1</sup> If this is intended as an exposition of the constitutionality of the Act of Congress, the only argument it offers is in the affirmation that such is the "scope and tenor of the Constitution," independently of the Act.

§ 933. With the views of these private writers may be classed the Opinion<sup>2</sup> written by B. R. Curtis, Esq., for the

<sup>1</sup> This is one of the authorities referred to by Story in the passage cited from his Commentaries. They both cite Wright v. Deacon, 5 Serg. & Rawle, 62.

<sup>2</sup> Mr. Curtis prefaced his examination of this objection by acknowledging the effect on his judgment of great existing weight of authority supporting the law of 1793, referring to 5 S. & R., 62; 9 Johns., 16, 67; 12 Wend., 12, 311, 507; 16 Peters, 622. He says, besides: "But, on reflection, [on the arguments offered against



U. S. marshal, from which a portion relating to the nature of the commissioner's action has been given, *ante*, p. 678, note. The portion here given is intended to apply to the question of jury trial. But it also exhibits very clearly how the two questions are connected, and bears quite as strongly on the

this authority.] I think if this were a new question, it could not be shown that the law contravenes this article of the Constitution.

"At the time the Constitution was formed, there existed in the jurisprudence of all the States (aside from suits in equity and admiralty) the trial of crimes, the trial of rights of persons and property between party and party, and judicial inquiries, summarily made, designed to accomplish some limited and special object, but not to try and finally settle the right in contestation.

"The Constitution, as originally adopted, contained a clause securing the right of trial by jury only in the trial of crimes. Its silence respecting the trial by jury in suits at the common law, and the appellate jurisdiction given to the Supreme Court, 'both as to law and fact,' were laid hold of by the enemies of the Constitution as strong reasons for its rejection, and, even after its adoption, formed no inconsiderable part of the grounds of opposition to the new government (4 Marshall's Life of Washington, 209, 210). To obviate these objections, the second article of the amendments, establishing further guards for the citizen in criminal prosecutions, and the seventh article, securing trial by jury in suits at common law, were adopted.

"I am not aware that it has ever been supposed by any one that these two articles had any reference to the third class of judicial inquiries above mentioned. That justices of the peace in the District of Columbia may commit to prison a person who, on a summary inquiry before them, may appear to be probably guilty of an offence, and thus deprive him for a time of his liberty; that the same thing may be done by magistrates in the States, for offences against the laws of the United States; that the Executive authority of any State to which a person shall have fled, on the requisition of the Governor of another State whence he fled, and the production of an affidavit made before a magistrate and properly certified, may deliver up the person charged with a crime by such affidavit; that the government of the United States, through its magistrates, may apprehend a fugitive from a foreign country, with which a treaty to that effect exists, and, upon a finding by such magistrate, may deliver him up to be transported to the country whence he fled, I suppose no one has doubted. And if this be so, then it would seem to follow that, besides the trial of crimes and suits at the common law, in both which a jury must intervene, there is a third class of judicial inquiries, and executive action thereon, in which the Constitution does not require a jury. Under this view, two questions arise:

"1st. Whether, in point of fact, the proceeding before the commissioner, under the statute of 1850, is a judicial inquiry, to be summarily made, designed to accomplish some special and limited object, but not to try and finally settle the right in contestation; and—

"2d. Whether, if it be so, Congress had the constitutional right to adopt and apply such a proceeding to the case of a fugitive from service, and grant the aid of the executive power of the United States upon the result of such a summary proceeding.

"This first question must be answered by an examination of the Act in question, and the Act of 1793, which is in *pari materia*, which the Act of 1850 was intended to amend, and to which it is supplementary. The Act of 1793, in the 1st and 2d sections, makes provisions for fugitives from justice, and empowers the agent appointed to recover the fugitive, 'to transport him or her to the State or territory from which he or she shall have fled.' The 3d and 4th sections have reference to fugitives from service, and enact, that the certificate given to the claimant or his agent 'shall be sufficient warrant for removing the said fugitive from labor to the

first question as does the extract already given. Although the force of judicial opinion cannot be claimed for it, the argument is entitled to great consideration, as being, probably,

*State or territory from which he or she fled.* It seems to me that the object of each of these sets of provisions was simply extradition. A certificate given by a magistrate, upon a summary inquiry, has no definite legal effect necessarily attached to it by the general principles of jurisprudence, and it must have one effect or another, according to the enactments which provide for it. Whatever effect the statute gives to it, it may possess—but nothing beyond this. And when this statute says it shall warrant a removal, it seems to me to be a very strained interpretation, which should attribute to it any other effect. I conclude, then, that the sole purpose of this law was extradition. If so, there is certainly a presumption at the outset that the Act of 1850, made to amend this law, had the same object in view. I perceive nothing in this Act of 1850 which leads to the conclusion that anything beyond this was intended. The 6th section declares that the certificates ‘shall be conclusive of the right of the person or persons in whose favor granted, to remove such fugitive to the State or territory from which he escaped, and shall prevent all molestation of such person or persons by any process issued by any court, judge, magistrate, or other person whomsoever.’ The whole of this taken together, I think, means that, for the purpose of removal, the certificate shall be conclusive, and no court, &c., shall do anything to prevent such removal. But having declared that the certificate shall be conclusive for this particular and limited object, it follows that it is not conclusive for any other, for it derives all its effect from the enactment, and here the enactment stops. And this conclusion is made necessary to my mind, when I find that the fact of service being due, and the fact of escape from service, may be conclusively proved before the magistrate, for the purpose of obtaining the certificate, simply by the production of the record of a court in the State whence the fugitive escaped, which record is to be made on *ex parte* testimony. To attribute to Congress an intention to allow the claimant to make proof by *ex parte* testimony of two, out of three, of the material points—to make this proof conclusive for the purpose of obtaining the certificate, and then to make the summary hearing operate as a trial settling the right, seems to me not to be warranted by anything found in this law. I am led by the whole structure of the Act, as well as by a detailed examination of the language of particular parts of it, to a clear opinion, that the proceeding before the commissioner is a summary judicial inquiry, terminating in a special and limited object, viz: extradition, and is not a trial and final settlement of the right in contestation. It is true the laws of the United States make no provision for any further trial. Neither do they in any case of extradition. The Parliament of Great Britain may suspend the habeas corpus, and keep imprisoned without trial a person given up; or pass a bill of attainder, and put him to death. Indeed, from the very nature of the case, the person given up is to be tried by the laws of the State or country to which he is restored, and it is for those laws to make provision for that trial. I do not mean to say that the government which makes extradition may not make conditions. But it seems to me no argument, that these proceedings were designed for a trial of the right, can be drawn from the fact that no conditions for a future trial are made. The only just inference is, that in this, as in other cases of extradition, the United States had confidence that justice would be done under the laws of the State to which the fugitive should be restored.

“If, then, in point of fact, this proceeding before the commissioner is summary, designed only for a particular and limited object, and does not try or finally settle the right in contestation, the inquiry still remains, whether Congress had the constitutional right to grant the aid of the executive power of the United States, upon the result of such inquiry.

“The Constitution declares that, upon claim being made by the party to whom the service is due, the fugitive shall be given up. The Supreme Court has decided that Congress may legislate in aid of the execution of this requisition of the Constitution. It is not said by the Constitution *how* this claim shall be made. It is,



the most complete on this point of any that have been offered in support of the Act of Congress.

§ 934. From the foregoing exhibition of opinions on the question, whether the Acts of Congress, by providing for removal of the escaped slave without trial of the facts at issue by a jury, are in violation of a constitutional guarantee, it appears that those supporting the negative may be discriminated, like those on the former inquiry,<sup>1</sup> as, *first*, those which thus determine by reference to the authority of earlier cases, and, *second*, those which determine it by independent reasoning; and that here, as in the former instance, the greater number of opinions are in the first class, and that here also many judges carefully avoid the expression of their individual opinion, and declare themselves to be following the earlier decisions,—sometimes even intimating a misgiving as to their correctness.

therefore, a subject of legislation *how* it shall be made. It is not said *how* it shall be determined; and it is, therefore, left to legislation how it shall be determined. The legislation must conform itself to any constitutional restrictions, if any such are to be found; but where can they be found? It will not be enough to say that the personal liberty of the citizen is a common-law right, and therefore it cannot be interfered with without a suit at common law, and in that a jury must intervene; for it is not true, that the personal liberty of the citizen can not be restrained without a suit at common law; and if it were, slaves are not parties to the Constitution, nor under its protection.

"If it be in the power of Congress to provide for the giving up of fugitives from justice without a trial by jury, which has been practiced on by the States for more than half a century, and never doubted, it seems to me the power is even more free from doubt in the case of a fugitive from service. Fugitives from justice may be, and often are, citizens, and under the protection of the Constitution, and entitled to the benefit of its provisions; fugitives from service, when slaves, are not thus entitled. Fugitives from justice cannot be seized and carried away without some inquiry and legal process; fugitives from service may be taken anywhere, by those having a legal claim, and by force of the legal title carried from the State. If it be said that a person may be seized, and, after this summary inquiry, carried away, who is not a fugitive from service, and thus a citizen may be temporarily, and perhaps finally, deprived of his liberty, because he may not find means to defend himself where he is carried; it may be said also that a person may be carried away, who is not a fugitive from justice, and may be unjustly and oppressively dealt with in the place to which he is transported. The truth is, the Constitution has in view neither of these cases. It provides great general rules and powers, leaving to legislation to guard and limit the practical application of those powers, so that injustice shall not be done; and if opportunity is given for injustice, it is the fault of the Legislature, who have not wisely exercised their powers, but by no means proves that the action of the Legislature *exceeds* its powers. If, then, the Constitution leaves it to Congress to determine *how* the claim shall be made, evidenced, and determined, upon which the fugitive shall be given up, I cannot perceive why this summary inquiry by a Commissioner is not constitutionally sufficient, however preferable you or I might consider some other manner of proceeding to be."

<sup>1</sup> *Ante*, p. 679.

The arguments found in the second class of opinions are distinguishable as—

1. That which assumes a parallelism between the delivery of the alleged fugitive slave to the claimant, and the delivering up of a fugitive from justice, and find an argument on authority in the customary acquiescence in the latter.

2. That argument which lies in the proposition that, admitting the general application of the objection to such an exercise of power on the part of the national authority, a summary proceeding, as an exception, is specially contemplated by this provision of the Constitution.

3. The argument that, admitting the general application of the objection, the guarantee does not apply in the case of a person claimed as a fugitive from labor, because slaves were not, or are not, "parties to the Constitution."

4. The argument that, the delivery to the claimant is not a being "deprived of liberty without the process of law," because it is preliminary or ancillary to some ulterior *due process of law* whereby the right to liberty will be determined; or the argument that it is an *extradition*, as opposed to a suit at law, or at common law.

5. That which may be called the argument from necessity.

§ 935. 1. As to the first argument, that which has already been said in respect to the same argument, urged in the former instance,<sup>1</sup> will apply here to show that the parallel does not exist, and the difference between the two acts of delivery will be noticed hereafter in connection with the fourth argument.

§ 936. 2. The argument comprehended in the proposition that a summary proceeding is specially contemplated in the constitutional provision, as ordinarily stated, and as stated by Judge Story in sec. 1812 of his Commentaries, is simple assertion. The question being—is a summary proceeding, or one without the verdict of a jury, sanctioned by the Constitution? the argument is—such a proceeding was contemplated, or is indicated in the provision itself,—therefore, sanctioned. Now, since it is not shown where or by what words in the pro-

<sup>1</sup> See *ante*, § 906.



vision this intention of the authors of the Constitution is discovered, the argument, if any, must be founded on something like a distinction between interpretation and construction, and amounts to this: While the fair interpretation of the terms of the guarantee in the Amendment requires the verdict of a jury to sanction such delivery, yet, by construction of the provision, it may be known that an exception is here intended. If this is the argument, the construction resorted to appears to be that under which the provision is regarded as a compact or treaty between the States, and, it being assumed that the State has therein given a guarantee to the other States, it is argued that this guarantee, operating as public law, must override all other guarantees operating as private law. If this were the true construction, it might fairly be urged that this guarantee given by the State to other States must be subject to the pre-existing guarantees which it had given to private persons. And if (on the supposition that a guarantee given in the Constitution of the United States must be executed irrespectively of guarantees in State constitutions) this argument might be admitted to justify an extradition by the State's authority in disregard of the State's bill of rights, yet the Constitution of the United States itself contains similar guarantees of the rights of private persons; and all parts of the same instrument must be construed in harmony. Such guarantees in the Constitution are expressly intended to restrain all exercise of powers conferred by national authority, and should apply here; even if it could be maintained that Congress or the national Government are authorized to act, instead of the States, in fulfilling the duty which arises under this construction (according to the theory in the second of the four constructions exhibited in a former chapter), or if the duty of delivery is imposed by the provision upon the national Government, according to the theory connected with the third construction.

It has been said by some that the words "on claim," fairly interpreted, are enough to show that a summary proceeding was intended.<sup>1</sup> No argument in support of this, from any

<sup>1</sup> See *Life of Judge Beardsley*, 548; counsel in 14 Wend. 519; Conway Robinson's Essay, 6 South. Lit. 100.

previous *usus loquendi*, has been presented. Such interpretation is only, in fact, another form of stating that construction of the provision which has just been indicated; being equivalent to saying that an international requisition or demand for rendition, made upon the State as a political person, in distinction from a controversy between private persons, results from the character of the provision. The term *claim* and the term *demand* used in the clause relating to fugitives from justice are each primarily used to indicate the legal pursuit of private rights.

§ 937. 3. In the third argument—that these guarantees do not apply to persons claimed as fugitives owing service and labor in some State from which they have escaped, because slaves are not, or were not, parties to the Constitution—there is more than one fallacy.

In the first place, it is not as party to the Constitution that the guarantees contained in it apply in the case of any private person. The Constitution is either the act of one party alone, the integral people of the United States, or of as many parties as there are States; the integral people of each State being in that view a party. The idea that any natural person, in his individual capacity, is or was a party, is a relic of the *social-compact* theory. If any individual members of society may be discriminated as parties in the genesis of the State and national Constitutions, they must be those who held the elective franchise; and it was never pretended that these guarantees applied to those only who are “freemen” in that sense of the word, even under State constitutions wherein the phraseology is, “no freeman shall be disseized,” &c. These guarantees have been declared by some one or more constituent parties (of whom it is enough to know that he or they held the supreme power) for the benefit of certain recipients, who, in that sense, may be called parties; and the argument may be, that persons claimed under this provision are excluded from the number of these recipients, because slaves are not the recipients. It may be admitted that these guarantees do not apply to slaves when introduced into the constitution of a State wherein slavery exists; that they are to be understood as—no freeman, *nullus*



*liber homo*, shall be disseized, &c.<sup>1</sup> But these guarantees in the national Constitution are against the powers of the national Government, even when employed in enforcing the national law; and the national law, of itself, knows nothing of the status of persons as bond or free; it recognizes persons according to the status given them in the State where it finds them. In the eye of the national law, the status of the man who has escaped from a State wherein he was a slave, and who is in a non-slaveholding State, must be given by the law of the latter until the contrary is proved; and how it shall be proved, is to be determined by these guarantees of the Constitution which apply to him as well as to those not liable to such claim. When the question is, how shall a man be proved to owe service and labor, to have escaped, &c., it is absurd to say it is proved by assuming him to be a slave.

It may be objected that these guarantees do not necessarily have a universal personal extent; that, as a personal distinction was recognized in the extent of these guarantees at common law in the several colonies, and that, as it is now recognized in determining the *quasi*-international recognition of citizens and their privileges and immunities under another clause of the fourth Article,<sup>2</sup> so it must here be applied. The answer here, also, is, that the extent of such guarantee depends on the law of the State, and that, as the national Government recognizes slaves in the slave States as not protected by such guarantee, so, in a State attributing personal freedom to all or any,<sup>3</sup> it must recognize the guarantee as extending to such; and that to except a person from it, because *claimed* not to be protected by it, when the question turns upon his being a person included under the provision, is absurd.

In the denial of the application of these guarantees there is either a fallacy in the reasoning, or the argument is incidental to the doctrine upon which the doctrine of seizure and removal depends, that the effect of the provision, independently of the

<sup>1</sup> Williams, Ch. J., in *Jackson v. Bullock*, 12 Conn. 43.

<sup>2</sup> *Ante*, § 650.

<sup>3</sup> That negroes do not participate in the political franchises held by white persons of the same age, sex, and property qualification, is no reason for holding that they do not participate in the benefits of a State bill of rights. See *Ely v. Thompson*, *ante*, p. 11.

action of Congress, is to make the law of status of the State from which the slave escapes operative in the State into which he goes, thus continuing all his liabilities and all correlative rights of his owner under sanction of the Constitution operating as private law. This doctrine has already been examined. But if it were correct, the question occurs—how is one to be known to be thus affected by the law of some State other than that which is the forum of jurisdiction? The argument proves too much; if good for anything, the conclusion is, that any man may be seized as a fugitive slave and removed, and that the State has no power to protect any of its citizens against such seizure.<sup>1</sup>

§ 938. 4. The fourth argument, which is that principally relied on, is the same as the fourth in the series, already noticed, of arguments against the objection that the commissioners exercise judicial power. The observations already made in answer to that argument<sup>2</sup> will apply here also. The argument that in the constitutional provision a *case of extradition* is contemplated, as distinguished from a *suit at common law*, will be considered in the sections immediately following, wherein the proper extent of these terms is examined.

Besides, if the judge's or commissioner's decision were, by the law of Congress, made preliminary to ulterior proceedings in the State from which the person claimed is said to have escaped, the question arises—what is a trial by jury, in view of the Constitution of the United States? Without minute discussion it may be affirmed to mean jury trial as known in the colonies and States in the generality of cases, and to the selection and impanneling of juries in ordinary suits at common law. But it is evident that trial by jury may have a very

<sup>1</sup> The judgment of the Supreme Court of the United States, in *Prigg's case*, reversed the judgment of the Pennsylvania State Court against him, on the ground that he had a legal right to do what the State court held he might be punished under the State law for doing. But in the same judgment the Supreme Court declared that State law, which applied equally to cases where there was no such right to remove a person, to be unconstitutional and void. (*Ante*, p. 479.) This was, actually, the doctrine maintained by Judge Story in this case,—the States have no power to punish the forcible removal or kidnapping of persons within their jurisdictions, whether the persons so removed or kidnapped are or are not fugitive slaves. The same thing is asserted by Judge Crawford in *Booth's case*, in the extract given *ante*, p. 715, note.

<sup>2</sup> *Ante*, § 908.



different meaning in the jurisprudence of the different States; and it will appear, from a cursory examination of the statute law of the slave States, that a trial of the issue of freedom or slavery by jury in some of those States must be a very different thing from jury trial of the issue under the national authority with the ancient common-law sanctions.

5. The argument, from a supposed necessity, being equally applicable against other objections taken against the law of Congress, will be considered hereinafter, with those objections.

§ 939. Admitting the weight of judicial authority to be affirmative of the validity of the law of Congress, though not providing for a trial by jury, it may yet, in accordance with the method herein pursued, be inquired how the question is to be regarded in the light of general principles applied to the construction and interpretation of these clauses of the Constitution.

If that view of the nature and operation of the provision be the correct one, according to which it acts as private law, creating cases falling within the judicial power of the United States, and if, on the grounds hereinbefore presented, the right of the claimant is not one which he may himself make perfect by seizing and removing the slave or bondman,<sup>1</sup> then, in being a demand against a legal person, whose status is presumptively determined by the local law of the State in which he is claimed for a debt of personal service, such claim may properly be called a *suit*. For a suit, in ordinary speech, is equivalent to a legal claim or demand of one or more private persons against one or more other private persons, to be decided by some instrument of the judicial function of sovereign power. Such claim of a master seems to be within the description of a suit which is given by Marshall, Ch. J., in *Cohens v. Virginia* (1821), in reference to the use of the word in the eleventh Article of the Amendments.<sup>2</sup>

<sup>1</sup> *Ante*, pp. 569-580.

<sup>2</sup> 6 Wheaton, 407, Marshall, C. J., delivering the opinion of the court: "What is a suit? We understand it to be the prosecution or pursuit of some claim, demand, or request. In law language, it is the prosecution of some demand in a court of justice. The remedy for every species of wrong is, says Judge Blackstone, 'the being put in possession of that right whereof the party injured is deprived.' 'The instruments whereby this remedy is obtained are a diversity

If it is said that this view of the operation of the provision itself is not supported by the leading authorities, and that, under the received construction, there can be no case within the judicial power, and consequently no suit, until a mode of pursuing the claim has been established by legislation, yet it is obvious that the effect of the legislation of Congress has been to produce a law acting on private persons in the same manner as the provision itself under the fourth construction; that, under this legislation, a case does arise in which the claimant and the person claimed are the parties, and that neither the State nor the national Government appears as party owing the obligation, and the latter appears only as the administrator of the law, which cannot be enforced without suit.<sup>1</sup>

Supposing, then, that the claim of the owner, made either under the provision itself, operating as private law, or under some Act of Congress giving it like operation on private persons, may be called a suit, it is then farther necessary to determine whether, under the particular class of suits here designated suits *at common law*, this claim or suit may be comprehended.

§ 940. If common law be here taken to mean a rule derived from precedents and custom, from the judicial application of natural reason, in distinction from a rule resting on positive legislation,<sup>2</sup> the only remedial forms which could be called suits at common law would be those which judicial tribunals might themselves adopt on the authority of precedent or custom; and, since there was not, before the formation of the

of suits and actions, which are defined by the Mirror to be the lawful demand of one's right.<sup>3</sup> Or, as Bracton and Fleta express it, in the words of Justinian, '*ius prosequendi in iudicio quod alicui debetur.*' Blackstone then proceeds to describe every species of remedy by suit; and they are all cases where the party suing claims to obtain something to which he has a right. To commence a suit is to demand something by the institution of process in a court of justice; and to prosecute the suit is, according to the common acceptance of language, to continue that demand."

<sup>1</sup> See the same reasoning applied in the parallel inquiry, *ante*, p. 690. From the words, "shall be delivered up on claim of the party to whom such labor or service is due," Mr. Wolcott, 9 Oh., 164, argues very forcibly that a common-law trial is contemplated. But application of the argument depends upon the construction which may be adopted. The same remark applies to Judge Smith's reasoning, 3 Wisc., 37-39, *ante*, p. 668. In these passages the judge and attorney general give the provision the fourth construction, while their denial of the power of Congress is based on the first construction.

<sup>2</sup> *Ante*, § 35.



Constitution of the United States, any customary or common law of the United States regarded as a single forum or jurisdiction, it might be questioned whether any forms of judicial proceeding which might be adopted by the tribunals holding the judicial power of the United States, either on their own authority or by the sanction of legislation, could be called common-law suits in this sense. Or, if any forms so used under the authority of the United States or in applying the judicial power of the United States may be denominated suits at common law, in this sense, it can only be such as may have formerly prevailed by force of precedent or custom in the particular State or several jurisdiction within which that judicial power is applied.' So that the judicial power of the United States, if applied in any of these forms, might be said to be employed in a suit at common law.

A common law, thus distinguished from positive legislation, must necessarily be recognized in every system of jurisprudence.' But, remembering the principle that the particular use of words by the authors or promulgators of the Constitution must be the key in interpretation,' it is to be noticed that while, in English and American jurisprudence, common law was thus distinguished from statute law, or positive legislation, yet it had another and peculiar limitation, when employed in discriminating judicial methods of enforcing rights and obligations and remedying wrongs, in which it is contrasted, not with statute law, but with the Roman or civil law, or with the remedial forms employed in its administration. When remedial proceedings and judicial formalities are referred to as "suits at common law," the presumption is that they are contrasted with suits which, though also conducted according to precedent and customary law, yet have not, in England and America, ever been so called, i. e., suits following the course of the Roman or civil law courts as it had customarily been understood in English and American equity practice and in courts of admiralty and maritime jurisdiction.

Now, in suits at common law, when so distinguished, a trial of questions of fact by a jury is the principal circumstance dis-

<sup>1</sup> Curtis' Comm., § 19.

<sup>2</sup> *Ante*, § 85.

<sup>3</sup> *Ante*, §§ 605, 606.

tinguishing them from suits following the civil-law forms of judicial proceeding. If, then, "suits at common law" are so designated with reference to the formal character of the proceeding, the Amendment is only equivalent to saying that the trial by jury shall continue to be used in those forms of proceeding which are characterized by a trial by jury. Under this construction, it would altogether depend upon the choice of the courts, or, at the farthest, upon the will of the national legislature, whether this Amendment should have any force in reference to the judicial determination of any particular right or obligation of private persons. In other words, it would depend upon the historical character of the form of proceeding which should be adopted for the judicial determination of any "case" or "controversy," whether it should be known as a "suit at common law" or not; and it would appear to be always within the power of Congress, under the power to invest and regulate the powers of the judicial department of the Government of the United States, to determine whether any particular right and obligation—any subject of remedy—should constitute the subject matter of a "suit at common law." By prescribing a method of proceeding unknown to the common law of England and of the several States, which thus distinguish between suits at common law and suits following the civil or Roman law, Congress might do away with the force of this Amendment in all cases, or in any particular class of cases or controversies falling within the judicial power of the United States.<sup>1</sup>

<sup>1</sup> This would seem to be Mr. Justice McLean's understanding of this guarantee, from his language in *Parsons v. Bedford*, 3 Peters, 450, 454, where, dissenting from the majority of the court, he held that the case, coming from the District Court sitting in Louisiana, was not a suit at common law, such as is intended in this Amendment, because the judicial power had been applied according to the forms of the civil law, or, rather, according to that peculiar form of remedy anteriorly used in Louisiana, partly derived from statute and partly from the law of France. On page 456 of the same report, Judge McLean notices the objection that, by this construction, it would be in the power of Congress to do away with the jury trial in any case, and answers it by saying that it is not to be supposed that Congress will disregard any injunction of the Constitution. But, it is evident that here the question is—what is it that Congress is bound not to disregard? what restraint does this Amendment impose upon the Government of the United States? But, adopting this interpretation of the guarantee, the answer would be, that the Constitution did not impose any such restraint; or, at least, not upon the legislative power of Congress. In *Baker v. Biddle*, Baldwin's C. C. R., p. 404, it is said:



Since, then, a jury trial in the determination of matters of fact is itself the essential characteristic of suits following the course of common law, as contrasted with other anteriorly known forms of remedy, it seems necessary, in order to give a substantial significance to this Amendment, to suppose that, though a suit is, strictly speaking, a *form* of legal controversy, yet here it must be construed to have a less technical sense, though one not unknown in popular use, and to signify a controversy which, irrespectively of the form of proceeding, may be designated a common-law controversy or case; or, in other words, that controversies are here intended respecting certain subject matters which have been heretofore determined, as common-law rights and obligations, by *common-law courts*, so called in contrast with those of equity and of admiralty and maritime jurisdiction,—the term *suit* designating rather the *subject* of controversy than the *formal method* of deciding it.

This construction of the seventh Amendment seems to be that received by the majority of the Supreme Court of the United States in *Parsons v. Bedford* (1830), 3 Peters, 446.<sup>1</sup>

"By the adoption of this Amendment [the 7th] the people of the States and Congress have declared that the right of jury trial shall depend neither on legislative or judicial discretion. There were two modes in which this right might be impaired:—1. By an organization of courts in such a manner as not to secure it to suitors. 2. By authorizing courts to exercise, or their assumption of equity or admiralty jurisdiction over cases at law. This Amendment preserves the right of jury trial against any infringement by any department of the Government."

<sup>1</sup> In *Parsons v. Bedford*, 3 Peters, 446, Mr. Justice Story, delivering the opinion of the court, said: "The trial by jury is justly dear to the American people. It has always been an object of deep interest and solicitude, and every encroachment upon it has been watched with great jealousy. The right to such a trial is, it is believed, incorporated into and secured in every State constitution in the Union; and it is found in the constitution of Louisiana. One of the strongest objections originally taken against the Constitution of the United States was the want of an express provision securing the right of trial by jury in civil cases. As soon as the Constitution was adopted, this right was secured by the seventh Amendment of the Constitution proposed by Congress, and which received an assent of the people so general as to establish its importance as a fundamental guarantee of the rights and liberties of the people." Then, reciting the Amendment—"At this time there were no States in the Union the basis of whose jurisprudence was not that of the common law in its widest meaning; and, probably, no States were contemplated in which it would not exist. The phrase, 'common law,' found in this clause, is used in contradistinction to equity and admiralty and maritime jurisprudence. The Constitution had declared, in the Third Article, 'that the judicial power shall extend to all cases in *law and equity* arising under the Constitution, the laws of the United States, and treaties made or which shall be made under their authority,' &c., and to cases of *admiralty and maritime jurisdiction*. It is well known that, in civil causes, in courts of equity and admiralty, juries do not

§ 941. Under this acceptance of the term "suits at common law," common law would include both the unwritten law—law derived from judicial precedent (common law in the original sense)—and that derived from positive legislation, statute, or treaty; in other words, a suit at common law might be one regarding rights and obligations derived from positive legislation, as truly as one regarding those derived from precedent, custom, or the judicial application of natural reason. And though the Constitution may be regarded as an act of positive legislation, so far as it is law for private persons, yet rights and obligations created by the Constitution would be the subjects of "suits at common law"—taking the term in this sense. If the claim of a master to the person of the slave

intervene, and that courts of equity use the trial by jury only in extraordinary cases to inform the conscience of the court. When, therefore, we find that the Amendment requires that the right of trial by jury shall be preserved in suits at common law, the natural conclusion is, that this distinction was present to the minds of the framers of the Amendment. By *common law*, they meant what the Constitution denominated, in the Third Article, 'law'; not merely suits which the *common law* recognized among its old and settled proceedings, but suits in which legal rights were to be ascertained and determined, in contradistinction to those where equitable rights alone were recognized and equitable remedies were administered, or where, as in the admiralty, a mixture of public law and of maritime law and equity was often found in the same suit. Probably there were few, if any, States in the Union in which some new legal remedies, differing from the old common-law forms, were not in use, but in which, however, the trial by jury intervened, and the general regulations in other respects were according to the course of the common law. Proceedings in cases of partition, and of foreign and domestic attachment, might be cited as examples variously adopted and modified. In a just sense, the Amendment, then, may well be construed to embrace all suits which are not of equity and admiralty jurisdiction, whatever may be the peculiar form which they may assume to settle legal rights. And Congress seems to have acted with reference to this exposition in the Judiciary Act of 1789, ch. 20 (which was contemporaneous with the proposal of this Amendment), for, in the ninth section, it is provided that 'the trial of issues in fact in the *district courts* in all causes, except civil causes of *admiralty and maritime jurisdiction*, shall be by jury'; and in the twelfth section it is provided that 'the trial of issues in fact in the *circuit courts* shall in all suits, except those of *equity* and of *admiralty and maritime jurisdiction*, be by jury'; and again, in the thirteenth section, it is provided that the trial of issues in fact in the *Supreme Court* in all actions at law against citizens of the United States, shall be by jury."

In *Baker v. Biddle*, Baldwin R., pp. 394, 405, Judge Baldwin, repeating the language of the above-cited case, also decides that the term "suits at common law," in the 7th Amendment, means the same as "cases at law" in the 3d Article of the Constitution.

On Burr's trial, in U. S. C. C. for Virginia, Sept. 3, 1807, Chief Justice Marshall decided that the expression, "trials at common law," used in the 34th section of the Judiciary Act, was not applicable to prosecutions for crimes. It applied to civil suits, as contradistinguished from criminal prosecutions, and to suits at common law, as contradistinguished from those which came before the court, sitting as a court of equity or admiralty. 1 Kent Comm., p. 333. 2 Burr's Trial, reported by Robertson, 482.



under this provision is, as here supposed, the subject of a suit, it will be a suit at common law within the intendment of the 7th Amendment, though resting entirely upon this provision regarded as a statute or treaty having the force of private law.<sup>1</sup>

§ 942. The Amendment declares that in suits at common law the trial by jury "shall be preserved." If the word "preserved" is taken to indicate that a suit at common law is one involving a subject matter which had formerly been triable by jury,<sup>2</sup> it would seem that the argument from anterior usage requires the preservation of jury trial in these cases.

The person claimed is, under the provision, as has been shown, a legal person owing service or labor, and in that respect precisely like a person claimed as a villein under the ancient English common law, who, if he denied the claimant's right to his service, might have the issue tried by a jury.<sup>3</sup> It is indisputable that the issue of *liber* or *non liber*,

<sup>1</sup> The latter clause of this Amendment is: "And no fact tried by a jury shall be otherwise re-examined in any court of the United States than according to the rules of the common law." The rules here spoken of must undoubtedly be those obtaining in the ancient customary law of remedy, known as common law in English and American jurisprudence. To suppose that any rule would be a rule of common law, if only not applied by a court of equity, admiralty, or maritime jurisdiction, would be to nullify the whole force of the Amendment. Any new mode of re-examining facts tried by a jury might, by statute, be made a part of that law of remedy which is called legal, as contrasted with equitable. See *Story* in *Parsons v. Bedford*, 3 Peters, 446, after the passage last cited.

<sup>2</sup> Rawle, on the Const., p. 137, speaking of the effect of this Amendment:—"The trial by jury is forever secured on its ancient basis, and cannot be multiplied beyond it."

<sup>3</sup> It appears that the lord might seize his fugitive villein; but the person seized might, in that case, maintain his right to freedom before a jury by the writ *de homine replegiando*. Fitzh. Nat. Br. 66; Mr. Hargrave's note, 20 Howell's State Tr., 38. Only when the person claimed confessed himself to be the villein could the sheriff, under the writ *nativo habendo*, seize and deliver him up to the lord. If he denied the villenage, the lord was in any case obliged to remove the cause from the sheriff's court to the common pleas, or before the king's justices in eyre; after which, it would appear he might arrest the supposed fugitive, though before the issue had been heard. The same effect was produced if the person claimed sued out the writ *de libertate probanda*; except that then, by common law, the person who had sued it could not be arrested, as he became the nominal plaintiff; but, in either case, the lord was required, as the actual plaintiff, to count upon the *nativo habendo*, the burden of proof being, in any case, upon him, and the issue on the plea of *frank* condition was heard, as directed in the writ *de libertate probanda*, at the assizes, which indicates trial by jury. The 25 Edw., 3, Stat. 5, c. 18, altering the common law, gave the lord power to seize the supposed fugitive, notwithstanding this writ; after which it fell into disuse; the pleading, trial, and burden of proof being the same where it had not issued. See Comyns' Dig. Villenage, c. 1, 2, 3. 1 Fitzherbert Natura Brevium, 77, where the forms of these writs are given, and the proceedings described. Also, Mr. Hargrave's note of the law on the subject from these sources, 20 Howell St. Tr., 38.

free or slave, has almost universally been triable by jury in the States wherein slavery has existed under the internal law.

These were instances in which the condition of the person claimed was to be determined by the *internal* law of the forum of jurisdiction—the law applying to the respective parties as domiciled subjects. It may be urged that an alien claims and receives another person as his bondman, in virtue of a right which, if it exists at all, is given by the *international* law of the forum, and that, for this reason, there is no parallel between the methods used in determining his claim and the methods of determining legal relations in the above instances. The same argument is implied in giving the name *extradition* to the delivery upon such a claim. It is equivalent to saying that the law determining such delivery is public international law, in distinction from private international law.

It has already been shown that, whether the delivery of a fugitive from service to his alien claimant was made under private international law derived from precedent or custom, or under international compacts for the rendition of fugitive servants or slaves, it was considered matter of legal controversy, a case at law, as much so as any other matter of judicial cognizance.<sup>1</sup> Being thus regarded, it was determined in a suit arising under common law, as contrasted with matters determined by courts of equity jurisdiction and of admiralty and maritime cognizance.

But the true character of the provision itself, as well as of the Act of Congress, as being private law, has already been exhibited.

If, in one of the States or colonies allowing slavery under its local (internal) law, an alien master had claimed a negro as his slave, or a white person as his indented servant, it seems probable that, if the alleged bondman had denied his slavery or apprenticeship, the issue was decided by the same judicial methods which were employed when a question of the same character arose under the internal law of the forum of jurisdiction, that is, when it arose between persons domiciled in that

<sup>1</sup> *Ante*, §§ 322, 798.



forum, and when there was no immediate prospect that the person claimed would be taken out of the forum of jurisdiction.

A negro claimed as a slave or bondman in England, before Somerset's case, was as fully entitled to a writ of *homine replegiando*<sup>1</sup> as any one claimed as a villein under the ancient law; and equally so, whether the claimant proposed to detain him in servitude in England, or to carry him back to the Plantations.

It has never been shown that, where the claim of the alien master was supported by some written intercolonial or inter-State compact, or was supported under private international law, the proceedings were summary, without jury trial, when the person claimed denied being the bondman of the claimant. The only colonial compacts relating to such claims were those in the eighth article of the New England Confederacy of 1643, in the seventh of that of 1672, and in the treaty between the New Netherlands and the New England Colonies of 1650. Although the nature of the proof to be required is, by these compacts, limited to specified documentary evidence, it does not appear but that the issue was to be decided by the same judicial methods in which it would have been determined if it had arisen between domiciled persons. There is no evidence that the question of fact was to be decided otherwise than by jury.<sup>2</sup>

§ 943. The guarantee of a jury trial is further limited in the Amendment by the amount of value in controversy. The matter in controversy being that of the liberty of a natural person, it will be in accordance with all analogies of the law to regard it as a matter of greater value than the sum named in the Amendment, since it is treated as beyond all valuation to that person; and it may be safely assumed that, whatever may be the value of the right of liberty to the alleged slave,

<sup>1</sup> 4 Comyns' Dig., 481.

<sup>2</sup> There may be a strong presumption, from the general history of the times, that these questions were generally decided by the magistrates with very little ceremony. But at that time these were all slaveholding jurisdictions. Besides, the observations in the note, *ante*, p. 682, apply here against deriving any argument on this question from these compacts.

the antagonistic right of any one claiming him as such will be beyond the specified amount of twenty dollars.<sup>1</sup>

§ 944. It would seem that the objection to these Acts of Congress for allowing the person claimed to be delivered up without jury trial must be based more on the seventh article of the Amendments, which guarantees it in cases at common law, than on the fifth, which declares that no person shall be deprived of life, liberty, or property, without due process of law. It seems to be very commonly held that the latter limits the juridical action of the national Government only in the exercise of punitive authority, or the power to punish violations of some law (public wrongs), and not in the judicial establishment of rights and obligations existing in relations between private persons. There may be no direct judicial authority to that effect, but the clause seems to have been noticed by the leading commentators only in connection with criminal jurisprudence.<sup>2</sup>

<sup>1</sup> In *Lee v. Lee*, 8 Peters, 47, a claim for freedom in the District of Columbia. Mr. Justice Thompson, delivering the Opinion of the Court, said:—"On the part of the defendant in error, a preliminary objection has been made to the jurisdiction of this court, growing out of the Act of Congress of the 2d of April, 1816 (Davis' Col. 305), which declares that no cause shall be removed from the Circuit Court for the District of Columbia, to the Supreme Court, by appeal or writ of error, unless the matter in dispute shall be of the value of one thousand dollars or upwards. The matter in dispute in this case is the freedom of the petitioners. The judgment of the court below is against the claims to freedom. The matter in dispute is, therefore, to the plaintiff in error, the value of their freedom, and this is not susceptible of pecuniary valuation. Had the judgment been in favor of the petitioners, and the writ of error brought by the party claiming to be the owner, the value of the slaves as property would have been the matter in dispute, and affidavits might be admitted to ascertain such value. But affidavits estimating the value of freedom are entirely inadmissible, and we entertain no doubt of the jurisdiction of the court." This authority was cited by Mr. O'Connor, counsel in *Jack v. Martin*, 14 Wend. 521. But in *Barry v. Mercein*, 5 How. R. 103, it was held that the Supreme Court of the United States has no jurisdiction when the circuit court refuses the writ of habeas corpus, because the value of the dispute is, in its nature, incapable of being estimated in money, and the rule of jurisdiction cannot be applied. See also in matter of *Metzger*, 5 How. R. 176. (1 Kent, p. 324, 7th ed., n.)

<sup>2</sup> Story, Comm. § 1788, says of this clause:—"This also is an affirmation of a common-law privilege. But it is of inestimable value." Then, after some observations on extorted evidence, he says, in § 1789:—"The other part of the clause is but an enlargement of the language of Magna Charta '*Nec super*,' etc. 'Neither will we pass upon him,' &c. Lord Coke says that these latter words, *per legem terre* (by the law of the land), mean by due process of law; that is, without due presentment or indictment, and being brought in to answer thereto by due process of the common law. So that this clause, in effect, affirms the right of trial according to the process and proceeding of the common law." (Citing 2 Inst. 50, 51; 2 Kent, Lec. 24; Cave's Eng. Liberties, 19; 1 Tuck. Bl. Comm. App. 304, 305; Harrington on St. 17, 867.) Kent, 2 Comm., p. 13, speaks of the phrases in connec-



If it be asked—by what process of reasoning the delivery, by public authority, of a person, presumptively free, to the custody and control of another private person, as the bondman of the latter, is not to be called *depriving* one of his liberty?—the distinction may perhaps be founded on the meaning of the word *deprived* construed in connection with the modes in which legal rights and obligations are recognized when legal relations are to be maintained as the effects of positive law. It might not, perhaps, be a too-finely-spun distinction to say, that the judicial determination of the fact, whether a disability or obligation, incompatible with some individual or absolute right, has a legal existence, and the enforcement or establishment of the right correlative to that disability or obligation are very different from juridical action in punitive jurisprudence when a person who has violated some law is debarred of the enjoyment of an individual or absolute right which he possessed before. It might be said that the last, only, can be called the deprivation of a right; that the first is the judicial establishment of the fact that a certain right was not the right of the person to whom it is thereby judicially denied, or that it did not legally exist. It might, perhaps, be said that the presumptive attribution of liberty, in cases of claim to personal service, is only a rule of evidence; that it is not such a confession of an existing right to the enjoyment of personal liberty as is made in every case wherein question is made of the liability of a person to a punitive law decreeing imprisonment. It is only a presumption throwing the burden of proof on the other side; it being still supposed that the right may not in fact belong to the person to whom it is so attributed, and the inquiry is, whether the right exists or not.<sup>1</sup>

tion with criminal jurisprudence only, and says:—"The words, *law of the land*, used in Magna Charta, in reference to this subject, are understood to mean *due process of law*; that is, by indictment and presentment of good and lawful men. And this, says Coke, is the true sense and exposition of the words." But Kent adds:—"The better and larger definition of due process of law is, that it means law in its regular course of administration through courts of justice,"—meaning, apparently, that jury trial is not intended to be guaranteed. See also A. S. Johnson, J., in 3 Kernan, N. Y. 425. Judge Ruffin, in *Hoke v. Henderson*, 4 Devereux, 15, held the guarantee to apply in reference to "divesting of the rights of property," as well as "to the infliction of punishments."

<sup>1</sup> Such a distinction may seem to have been illustrated in two cases in New York, where statutes transferring private property from one person to another

§ 945. By the above exposition of these constitutional guarantees, the objection against the two Acts of Congress, as violating the seventh article of Amendment by not allowing a determination by a jury of the issues arising on a claim for a fugitive from service under the provision, seems to be well founded. If this argument is of any force against the weight of authority on this point, it also confirms the conclusion, reached in the last chapter, that the action of the commissioners, according to the law of 1850, does involve an exercise of the judicial power of the United States.

§ 946. Among the means provided by Congress for the delivering up fugitives from labor, it is also necessary to consider the objection that the Acts of Congress, in authorizing a seizure of the alleged fugitive without a warrant, are in violation of the fourth Amendment, declaring that "the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated."<sup>1</sup>

The cases sustaining the right to seize and remove the alleged fugitive from the State in which he is found, as a right given by the provision in the Constitution, would apparently be authorities sustaining the right to arrest under the legislation of Congress, as the less included in the greater; and there may be cases wherein a right to seize for the purpose of making a claim before public authority, is recognized as given by the

were held to violate the clause in the State Constitution "inhibiting the deprivation of property without due process of law." In the matter of John and Cherry Streets, 19 Wend. 676, Cowen, J., says that the clause means "that to work a *change of property* from one private person to another, some proceeding must be had in a court of justice," &c. In *Taylor v. Porter*, 4 Hill, 146, Bronson, J.:—"It must be ascertained judicially that he has forfeited his privileges, or that some one else has a *superior title* to the property he possesses before either of them can be taken from him," &c. By this last statement, controversies respecting the *right* of property seem included. But, admitting the application of the clause against the transfer of property, it does not seem to render the verdict of a jury necessary to such transfer, for, by the New York railroad law of April 2, 1850, sec. 49, the value of land taken from private persons is determined by commissioners. See *Buf. & N. Y. R. R. v. Brainard*, 9 N. Y. (5 Selden), 100.

<sup>1</sup> See the objection taken by counsel in 2 Pick. 15, 9 Oh. 174. Judge Thacher's objection was that, as the law of 1793 had not specified how the arrest was to be made, an intention to follow the local procedure must be supposed. See *ante*, p. 553. "The term *unreasonable* is used to indicate that the sanction of a legal warrant is to be obtained before such searches or seizures are made." Rawle on the Const., 127.



constitutional provision, while the doctrine of removal without establishing such claim is rejected.<sup>1</sup>

In some cases the right to seize may be ascribed only to the legislation of Congress. But all the cases in which custody originating in such seizure has been judicially maintained, are authorities against the force of this objection.

The only argument judicially relied on,<sup>2</sup> in answer to the

<sup>1</sup> In 9 Oh., 174, Mr. Wolcott spoke of the Act as intended to protect the claimant, not merely in arresting the fugitive for the purpose of making a claim before a judge or commissioner, but also in removing the supposed fugitive from the State without obtaining a certificate. But the Act has not been commonly so understood.

<sup>2</sup> The argument of Mr. B. R. Curtis, in the Opinion written for the marshal, is, on this point, as full, probably, as any that has been given. It is as follows: "The objection to this law that it conflicts with the fourth article of the Amendments, which establishes the right of the people to be secure against unreasonable searches and seizures, seems to me to have no application to the case. It has been determined, upon great consideration, by the Supreme Court of the United States, in *Prigg's* case, that, by force of the Constitution itself, the owner of a slave is clothed with authority, without any warrant, to seize and recapture his slave. And this is in conformity with decisions previously made in the highest courts of several States, and, among others, of the State of Massachusetts (2 Pick., p. 11). It was also determined in *Prigg's* case, upon reasoning which it seems to me impossible to resist, that Congress has the power by legislation to afford means to enforce the delivery and secure the subsequent possession of the slave. Now, if the exercise of the right of recapture without any warrant is constitutional, I think it would be difficult to show that the exercise of this same right by the aid of a warrant, issued in conformity with an Act of Congress, designed to afford means to enforce the delivery, is not constitutional. It is well known that this fourth article was in affirmance of the doctrine of the common law, which prohibits general warrants, and was designed to restrain the government from making searches and seizures of the persons, houses, papers, and effects of the people of the United States, either without warrants, or upon warrants not conformable to the terms of this section. But if the class of persons now in question are not embraced in the word people, if they are not protected from seizure, if, on the contrary, the Constitution itself has conferred the right to seize them without warrant, it would be difficult to maintain that a seizure by a warrant is not allowed by the Constitution. In the case before referred to, in 2 Pick. R., Mr. Justice Thacher dissented from the other judges, because there was no warrant used. I have not known of any judge who thought the existence of a warrant an objection.

"Indeed, I see nothing in this Act of 1850 which would render it improper for the court, or the commissioner, to require the case to be brought within the very terms of the fourth article of the Amendments. The 6th section of the Act says the claimant may procure a warrant from some one of the courts, &c. It prescribes no rule to govern the action of the court in issuing the warrant. If it were at all doubtful whether the case be within this fourth article, I should suppose that any court would take care to have the preliminary requisites, made by this article, complied with. I understand they were complied with in the cases in which warrants have been issued here.

"It has been repeatedly suggested that this reasoning proceeds on the assumption that the person sought for is, in fact, a fugitive from labor,—a fact which, when the warrant issues, still remains to be established. This is true; but it is none the less true in all other instances of legal proceedings. The law affords a remedy for a particular class of cases, describing that class of cases so as to dis-

objection, seems to be that of Parker, Ch. J., in *Commonw. v. Griffith*, 2 Pick., 17 (*ante*, p. 552), that, admitting the general application of the objection, the guarantee does not apply in the case of a person claimed as a fugitive from labor, because slaves were not or are not "parties to the Constitution."

The argument, if valid here, applies equally against objections founded on other guarantees in the Constitution, and has been already considered.<sup>1</sup>

But, on this point, the true doctrine may be, that a warrant for the purpose of making claim, according to the Acts of Congress, is not necessary under this Amendment, because it applies only in the application of punitive law.<sup>2</sup>

This being admitted, it would seem competent for Congress to authorize the claimant to arrest for the purpose of bringing the fugitive before the tribunal which is to determine the claim. But there is an immense distinction between allowing a seizure on this ground, and placing it on the basis (upon which so much has been built) that the person liable to the claim is a slave who, in the slaveholding State, might be seized by his owner.<sup>3</sup>

tinguish it from all others. Whenever any step in the progress of this remedy is taken before trial, it can only be upon the assumption that the case belongs to that class. Thus the law of this Commonwealth allows one who has a legal claim to attach the property of him against whom the claim exists. It does not allow one who has no legal claim to attach another's property. Yet, from the nature of the case, the attachment precedes the trial, and is made upon an assumption that there is a legal claim. So, when a demand for the extradition of a person charged with a crime in England is made here, the warrant must issue upon an assumption of certain facts, which, upon the examination, may turn out not to exist.

"I apprehend that if the law, on its face, describes a class of cases, and authorizes process only in those cases, it can never be an objection to the constitutionality of that law that, though it is valid when confined to those cases, it may by accident or malice be applied to others, not within its terms or meaning; which others, if included in the law, would have rendered it, as to those cases, unconstitutional. The obvious reason is, that these latter cases are not embraced in the law, and therefore cannot affect it. It would certainly be a strange argument against the constitutionality of a new penal law, that persons who did the act made penal, previous to its being made so, might, by accident or malice, be punished under it. Yet it seems to me to be the same argument which I have been adverting to."

<sup>1</sup> *Ante*, p. 726.

<sup>2</sup> *Walker v. Cruikshank*, 2 Hill, 300. *In trespass*: the plaintiff had been arrested under warrant issued without preliminary affidavit. *Bronson, J.*: "We are referred to the Bill of Rights, which provides, &c. \* \* \* This relates to criminal process, and has nothing to do with arrests in civil suits. We have always had a Bill of Rights, and yet, until a very recent period," &c.

<sup>3</sup> Compare the arguments *ante*, p. 553 note, and § 816.



§ 947. The sixth section of the Act of 1850 provides for evidence by depositions, or other "satisfactory testimony," to be taken before State officers in the State in which the fugitive was held to service, which is to be competent proof before the judge or commissioner in the State in which the person claimed as such fugitive is found; and the tenth section provides for record evidence taken in the same manner and having the like effect. It has been said that, by this legislation, Congress would confer the judicial power of the United States contrary to those provisions in the Constitution which have also been held incompatible with the action of the commissioners and State magistrates.<sup>1</sup>

The objection appears to have been taken in Allen's case;<sup>2</sup> and the view of Judge Marvin, sustaining the law, seems to be in accordance with the doctrine of concurrent judicial power which has been given in the fifteenth chapter of this work.

But this view of the source of the power exercised does not avoid the force of the objection that, according to the statute, a tribunal having no actual jurisdiction of the person who is claimed determines the effect of evidence for some other tribunal which has such jurisdiction.<sup>3</sup>

<sup>1</sup> *Ante*, p. 629.

<sup>2</sup> *Ante*, p. 60. On pp. 97, 98, of the pamphlet report, Judge Marvin said: "It is further insisted that the Act is unconstitutional because it allows testimony, depositions, &c., taken before State officers. \* \* \* Some confusion has arisen, I apprehend, from the authorities cited and the arguments upon these questions. It is true that the *judicial power* of the U. S. is vested in the U. S. courts, and that Congress has no power to vest *judicial powers* in State courts. It does not, however, follow that a State judge, or magistrate, or court, may not execute and carry into effect laws passed by Congress, when those laws provide that the State judge, magistrate, or court may do so. The State magistrate derives all his *judicial power* from the State constitution or laws. He may, however, if he pleases, *use that judicial power* in executing the laws of the U. S., provided the laws of the State do not forbid, and provided, further, that the thing to be done by the State magistrate or court can be done in the manner and in accordance with the rules, proceedings, and practice of the State courts. A State court cannot execute the criminal laws of the U. S., the crime being charged against another sovereignty, &c., &c. I think these principles and distinctions will appear from a careful examination of the cases cited, and from other cases; and they will be found stated, I think, in Kent's Commentaries, treating upon the jurisdictions of the U. S. and State courts as affected by the U. S. Constitution." But this theory will support only the action of judges of courts of ordinary common-law jurisdiction; see *ante*, § 456. Mr. Loring, in Burns' case, VII. Mon. L. R., 205, thought that Congress had, in the Act of 1850, only used the power given by the first section of the fourth Article to prescribe the effect of the records and judicial proceedings of the States. But the rule, as ordinarily received, *ante*, § 609, would exclude such proceedings as having been taken when there was no actual jurisdiction.

<sup>3</sup> Counsel's 3d point in Sims' case, IV. Mon. L. R., 5—"That the transcript of

Mr. G. T. Curtis, in *Sims' case*, IV. Mo. L. R., 9, argues that, if Congress could, in the law of 1793, empower State magistrates to "exercise the whole of this jurisdiction, find every fact involved in the inquiry, and grant a certificate upon such finding, it is surely competent for Congress to confer upon a State magistrate authority to exercise part of this jurisdiction, and make a part of this inquiry." But the State magistrates who could act as provided by the law of 1793 had the person claimed actually before them—a fact which renders the argument, from the inclusion of the part in the whole, entirely inapplicable.

§ 948. It has been objected against the evidence allowed under these sections of the Act of 1850, "that such evidence is also incompetent because the captive was not represented at the taking thereof, and had no opportunity to cross-examination."<sup>1</sup> This objection seems to be founded on some common-law principle which may be preserved under the ninth article of Amendment: "The enumeration, in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." The "confronting with witnesses," spoken of in the sixth article, applies only in criminal cases. It may be that the objection is answered by saying that there is no limitation in this respect on the power of Congress. If any other answer has been given,<sup>2</sup> it is probably dependent on the theory that the proceeding is only preliminary to judicial inquiry and decision elsewhere, and that the evidence is not used to determine the existence or non-existence of any legal

testimony taken before magistrates of a State court in Georgia, and of the judgment thereupon by such magistrates, is incompetent evidence, Congress having no power to confer upon State courts or magistrates judicial authority to determine conclusively or otherwise upon the effect of evidence to be used before another tribunal." (Cites *Const. U. S.*, Art. 3, § 1; *Martin v. Hunter*, 1 Wheat, 327, 330, 333.)

<sup>1</sup> Counsel in *Sims' case*, 4th point, IV. Mon. L. R., p. 5.

<sup>2</sup> In IV. Mon. L. R. 9, as part of Mr. Curtis' reasoning, the following is given:—"To the further objection to the competency of the evidence on the ground that *Sims* was not present at the taking thereof, and had no opportunity to cross-examine the witnesses, it was answered, that *Sims* cannot now complain that he had no opportunity to cross-examine the witnesses, for as it was proved that he had escaped from service in Georgia, his absence therefrom, and the consequent impossibility of being served with notice, were in his own wrong." But how was he proved to have escaped, unless by this evidence which is thus legitimated by assuming that he has escaped?



relation between the parties. The argument on that point has already been considered.

§ 949. Another distinguishing feature of the remedy provided by the Act of 1850 is that, in the fifth section, it empowers the commissioners or the persons appointed by them to execute process as aforesaid, to summon and call to their aid the bystanders or the *posse comitatus* of the proper county when necessary, &c., &c., and all good citizens are commanded, &c., &c.

A very interesting question of American public law—whether, under the distribution of sovereign power recognized in the Constitution, the national Government has any legal claim to the assistance of the *posse comitatus*—here presents itself. But it is too remotely connected with the subject-matter of this treatise, especially since Congress did not deem it fit to provide any penalties for the bystanders and good citizens who might decline to “aid and assist in the prompt and efficient execution of this law whenever their services may be required, as aforesaid, for that purpose.”

§ 950. Objection has also been taken to the concluding clause of the sixth section, which provides that the certificates granted “shall be conclusive of the right of the person or persons in whose favor granted to remove such fugitive to the State or Territory from which he escaped, and shall prevent all molestation of said person or persons by any process issued by any court, judge, magistrate, or other person whomsoever.” This, it is said, is in violation of that clause in the 9th section of the first article of the Amendments, which declares “the privilege of the writ of *habeas corpus* shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it.”

It would seem that judicial opinion on this point could be pronounced only in some case in which a court had been asked to grant the writ for the purpose of inquiring whether the judge or commissioner had decided properly in granting the certificate, and in which there was no question of the jurisdiction of such judge or commissioner. Probably no such case has yet occurred. In the reported cases in which *habeas corpus*

has been issued to bring up a supposed fugitive held under a judge's or a commissioner's warrant or certificate, it has been issued to try the question of jurisdiction.

This objection to the Act of 1850 was especially considered by the Attorney-General, Mr. John J. Crittenden, in the Opinion already noticed.<sup>1</sup> The portion bearing directly on the question is given in the note below. The whole argument in this

<sup>1</sup> *Ante*, pp. 531, 678. After a view of the legislative power of Congress, derived from Prigg's case, Mr. Crittenden says:—"My opinion, as before expressed, is, that there is nothing in that clause or section which conflicts with or suspends, or was intended to suspend, the privilege of the writ of habeas corpus. I think so, because the bill says not one word about that writ; because, by the Constitution, Congress is expressly forbidden to suspend the privilege of this writ 'unless when in cases of rebellion or invasion the public safety may require it;' and therefore such suspension by this act (there being neither rebellion nor invasion) would be a plain and palpable violation of the Constitution, and no intention to commit such a violation of the Constitution, of their duty and their oaths, ought to be imputed to them upon mere constructions and implications; and, thirdly, because there is no incompatibility between these provisions of the bill and the privilege of the writ of habeas corpus in its utmost constitutional latitude.

"Congress, in the case of fugitive slaves, as in all other cases within the scope of its constitutional authority, has the unquestionable right to ordain and prescribe for what causes, to what extent, and in what manner persons may be taken into custody, detained, or imprisoned. Without this power they could not fulfill their constitutional trust, nor perform the ordinary and necessary duties of government. It was never heard that the exercise of that legislative power was any encroachment upon or suspension of the privilege of the writ of habeas corpus. It is only by some confusion of ideas that such a conflict can be supposed to exist. It is not within the province or privilege of this great writ to loose those whom the law has bound. That would be to put a writ granted by the law in opposition to the law; to make one part of the law destructive of another. This writ follows the law and obeys the law. It is issued, upon proper complaint, to make inquiry into the causes of commitment or imprisonment, and its sole remedial power and purpose is to deliver the party from 'all manner of illegal confinement.' (3 Bl. Comm. 131.) If, upon application to the court or judge for this writ, or if, upon its return, it shall appear that the confinement complained of was lawful, the writ, in the first instance, would be refused, and, in the last, the party would be remanded to his former lawful custody.

"The condition of one in custody as a fugitive slave is, under this law, so far as respects the writ of habeas corpus, precisely the same as that of all other prisoners under the laws of the United States. The 'privilege' of that writ remains alike to all of them, but to be judged of—granted or refused—discharged or enforced—by the proper tribunal, according to the circumstances of the case, and as the commitment and detention may appear to be legal or illegal.

"The whole effect of the law may be thus briefly stated: Congress has constituted a tribunal, with exclusive jurisdiction, to determine summarily, and without appeal, who are fugitives from service or labor under the second section of the fourth Article of the Constitution, and to whom such service or labor is due. The judgment of every tribunal of exclusive jurisdiction, where no appeal lies, is, of necessity, conclusive upon every other tribunal. And, therefore, the judgment of the tribunal created by this act is conclusive upon all tribunals. Wherever this judgment is made to appear, it is conclusive of the right of the owner to retain in his custody the fugitive from his service, and to remove him back to the place or State from which he escaped. If it is shown upon the application of the



Opinion seems to be that, as, on general principles, habeas corpus should not issue if it appears that the imprisonment is on the decision of proper judicial authority (that is, does not issue to review judicial decision), therefore it should not issue when the certificate is issued by a judge or a commissioner in a matter in which (according to other orthodox opinion) he does not exercise judicial authority.<sup>1</sup> This portion of the Opinion bears, therefore, on the question of the judicial action of the commissioners.

Mr. B. R. Curtis, in the Opinion written for the marshal, waives the examination of this question, and refers to this Opinion of Mr. Crittenden, expressly stating his concurrence in the conclusion that this objection to the law is not tenable.

The sum of the matter, on the basis of this opinion, seems to be that, if the action of the judge or commissioner in giving the certificate is *ministerial*, then Congress cannot except a custody under it from judicial inquiry by habeas corpus. If it is *judicial*, then it is not valid as the action of a commissioner.

§ 951. An objection has been frequently taken to the provision, in the 8th section of this Act, that where the proceedings

fugitive for a writ of habeas corpus, it prevents the issuing of the writ; if upon the return, it discharges the writ and restores or maintains the custody.

"This view of the law of this case is fully sustained by the decision of the Supreme Court of the United States in the case of Tobias Watkins, where the court refused to discharge upon the ground that he was in custody under the sentence of a court of competent jurisdiction, and that that judgment was conclusive upon them. (3 Peters.)

"The expressions used in the last clause of the sixth section, that the certificate therein alluded to 'shall prevent all molestation' of the persons to whom granted 'by any process issued,' &c., probably mean only what the Act of 1793 meant by declaring a certificate under that act a sufficient warrant for the removal of a fugitive, and certainly do not mean a suspension of the habeas corpus. I conclude by repeating my conviction that there is nothing in the bill in question which conflicts with the Constitution, or suspends, or was intended to suspend, the privilege of the writ of habeas corpus."

<sup>1</sup> Similar is Judge Grier's reasoning in Jenkins' case, 2 Wallace, Jr., 526, *ante*, Vol. 1, p. 495, note 7. Judge McLean, in *Ex parte Robinson*, 6 McLean, 355, thus places the commissioner on the level with the State judicial tribunals. He says of the writ issued from the State court:—"It wrested from him, without any authority of law, the subject of his jurisdiction. This, so far as I know, is without precedent. Had any commissioner or federal judge interposed, and by the same means disregarded and disturbed the jurisdiction of a State court, I should not have felt less concern than the eloquent counsel." In habeas corpus from a State court the question is involved with the more general one of concurrent jurisdiction, considered *ante*, §§ 447-450.

are before a commissioner, "he shall be entitled to a fee of ten dollars in full for his services in each case, upon the delivery of the said certificate to, &c., or a fee of five dollars in cases where the proof shall not, in the opinion of such commissioner, warrant such certificate and delivery," &c. If the Act is invalidated at all by this objection, it must be by the effect of some common-law principle that the persons intrusted with the administration of the laws should be removed from all prospect of pecuniary gain, &c. But the principle, if it obtains at all, would seem to apply only to persons holding judicial power, as distinguished from ministerial, and the action of the commissioners is valid only if ministerial.

The objection above stated was raised in *McQuerry's case*. Judge McLean's answer to it is probably the only one which has been judicially declared. It is particularly to be noticed, in connection with the proposition upon which most of the questions arising under these Acts depend, that the action of the judge, magistrate, or commissioner, is preliminary to judicial proceedings in the State from which the person claimed is supposed to have escaped. The judge says, 5 McLean, 481:—"In regard to the five dollars, in addition, paid to the commissioner, where the fugitive is remanded to the claimant, in all fairness it cannot be considered as a bribe, or as so intended by Congress; but as a compensation to the commissioner for making a statement of the case, which includes the facts proved, and to which his certificate is annexed. In cases where the witnesses are numerous and the investigation takes up several days, five dollars would scarcely be a compensation for the statement required. Where the fugitive is discharged, no statement is necessary."

Judge McLean assumes that the material part of the certificate is a statement of evidence to be used in the State from which the person delivered up is supposed to have escaped and to which he may be taken. Hence he argues that, when the commissioner decides to deliver up, he has the labor not only of making out a certificate, but of stating all the evidence upon which he has decided.

The judge probably rested his opinion on that clause, in the



6th section of the Act, which requires the commissioner "to make out and deliver to such claimant, his or her agent or attorney, a certificate setting forth *the substantial facts* as to the service or labor due from such fugitive to the claimant, and of his or her escape from the State or Territory in which such service or labor was due to the State or Territory in which he or she was arrested, with authority," &c.

The very slender inference which may thus be drawn from this clause does, indeed, appear to be all which can be produced, to show that the commissioner's action in granting the certificate is preliminary to ulterior judicial proceedings.

It is plain, from what has already been said on the nature of the commissioner's action, that the fullest statement of the evidence before him would not vary the essentially judicial character of his decision.<sup>1</sup> But it does not appear that the commissioner is required to set forth the evidence as given before him, but only to state the substantial facts—that a certain person was held to service or labor in a certain State by its laws, and that he did escape therefrom. To suppose that the commissioner's statement of these facts, as they appeared to him, would be taken to preclude all controversy on the question of their truth in the judicial proceeding in the State from which the person delivered up is supposed to have escaped, would be to place the commissioner's finding on the level of a judgment, or equivalent to offering it in support of a plea of *res judicata*. But the possibility of this was excluded by the proposition that the commissioner does not exercise judicial power.<sup>2</sup>

Even if the commissioner were to set forth the evidence itself upon which he had granted the certificate, it is plain that such evidence could not be received in any ulterior judicial proceedings in the State from which the person delivered up is supposed to have escaped. For if he had been held to service or labor by the law of that State, and had escaped from it, the evidence of those facts must be found in that State; and the evidence to be produced before the commissioner, according to the first part of the 6th section of the Act, and as provided by the 10th section, is actually taken in that State.

<sup>1</sup> *Ante*, §§ 912-917.

<sup>2</sup> *Ante*, § 915.

§ 952. If the validity of these Acts of Congress is to be admitted, other practical questions may present themselves in reference to the remedial process by which the claim is to be presented, the proofs on which its legality is to be decided, and the method in which the delivery to the claimant is to be carried into effect. So far as these questions are not dependent on the general law of evidence, they are mainly questions of formal proceeding, and determined by the language of the statutes themselves, and may be passed over without any particular consideration.<sup>1</sup>

§ 953. The third and only remaining inquiry, in considering the means provided by Congress for carrying into effect the provision for the delivery of fugitives from labor, relates to—

3. The penalties by which rights and obligations created by the provision, or by ancillary legislation of Congress, may be secured and enforced.

The fourth section of the Act of 1793 gives a penalty, for the benefit of the claimant, of five hundred dollars for the acts of obstructing or hindering the claimant in arresting the fugitive, or of rescuing the fugitive after arrest, or of harboring and concealing after notice;<sup>2</sup> saving, moreover, to the claimant, his right of action on account of these injuries.\*

The seventh section of the Act of 1850 declares that the person who may commit these acts shall forfeit and pay, by way of civil damages, to the party injured by such illegal conduct, the sum of one thousand dollars for each fugitive so lost

<sup>1</sup> Administrator of deceased owner may claim and may appoint agent to claim under the Act of 1793, *Commonw. v. Griffith*, 2 Pick. 18. Letter of attorney is not required for that appointment. *Ib.* So is *Giltner v. Gorham*, 4 McLean, 402. But *contra* apparently is *Driskell v. Parish*, 3 McLean, 631.

<sup>2</sup> As to what acts will constitute the illegal conduct intended, see *Hill v. Low*, 4 Wash. C. C. 329; *Jones v. Van Zandt*, 2 McLean, 596, S. C., 5 Howard, 215; *Driskill v. Parish*, 3 McLean, 631, S. C. 5 ib. 64; *Giltner v. Gorham*, 4 McLean, 402; *Ray v. Donnell, et al.*, ib. 505; *Norris v. Newton*, 5 ib. 92; *Weimar v. Sloane*, 6 ib. 259; *Van Metre v. Mitchell*, 2 Wallace, Jr., 311, which were actions for the penalty. Also *Glen v. Hodges*, 9 Johns. 67; *Kauffman v. Oliver*, 10 Barr, 517; *Oliver v. Weakley*, 2 Wallace, Jr., 324, which were actions for damages.

<sup>3</sup> By 2 Wallace, Jr., 326, under the Act of 1793, if the plaintiff sues *in debt* for the penalty of \$500, which it gives for illegally harboring and concealing, he may recover it upon proof of such harboring and concealment, irrespectively of any proof of actual damage to himself. But if he brings *case* on account of the injuries for which the Act saves a right of action, he can recover only to the amount of actual damage which he shows he has suffered.



as aforesaid, to be recovered by action of debt, in, &c. No saving is made of any other right of action, and it would appear that no civil remedy was intended to be given for any damage which might occur to the claimant by such conduct, unless the fugitive should thereby be enabled finally to elude his pursuit. Whether it is within the competency of Congress to limit the amount of compensation for actual damage where the fugitive has been placed beyond recovery, and whether the claimant can, independently of legislation, recover civil damages in that case or in cases in which he has been delayed and obstructed in his pursuit, though finally successful—would appear to depend upon the question, whether the rights of the claimant to recover his slave are such only as exist by the legislation of Congress, or are conferred by the Constitution itself. This, again, will depend upon the true construction of the provision. The maintenance of any action for damages irrespectively of the penalty given by either Act, seems to support the fourth construction of the provision, by which it operates as private law.

If the right to damages exists under the provision itself, operating as private law, it would seem that the action might be brought in the State courts; for the national municipal private law contained in the Constitution is part of the law of each State. This view may be sustained by *Glen v. Hodges*, 9 Johns. 67, *ante*, p. 438. But in *Kauffman v. Oliver*, 10 Barr, 516, *ante*, p. 494, the court, even while it affirms that the claimant, under the provision, may seize and remove the fugitive, denies that he has any remedy except such as may be given by the legislation of Congress.<sup>1</sup> The same doctrine may have been held in *Jones v. Van Zandt*, 2 McLean, 596, 601.<sup>2</sup>

§ 954. The Act of 1850 differs from the earlier statute also, by declaring, in the seventh section, such illegal conduct punishable by fine and imprisonment.<sup>3</sup>

<sup>1</sup> Judge Coulter, in this case, appears to have understood *Prigg's* case as deciding that the whole subject matter is removed from the whole juridical power of the State, that neither the judiciary nor the legislature can notice any right under the provision.

<sup>2</sup> In *Johnson v. Tompkins*, 1 Bald. 571, *ante*, 441, the action was for damages; but the right of action appears to have been supported by the law of the State.

<sup>3</sup> *Campbell v. Kirkpatrick*, 5 McLean, 175,—that the action for the penalty and the prosecution can only be brought in the United States District Court, and cannot be removed into the Circuit. As to what is rescue, &c., see *Scott's* case, IV.

It may appear very reasonable to say that, whether a right of a private person is given by the Constitution itself, operating as private law, or by the legitimate exercise of the legislative power of the national Government, it will be in the power of Congress to protect that right by fines not "excessive," and by punishments not "cruel and unusual."

If the power of legislation in reference to the subject-matter of this provision is based upon the theory hereinbefore relied on, Congress cannot do more than is necessary to maintain the exercise of the judicial power of the United States, in reference to the *cases* which arise under these provisions, according to the fourth construction.<sup>2</sup>

Under the theory advanced in *Prigg's case*, supporting a power in Congress to legislate for the general object of carrying these provisions of the Constitution into effect, it would be very easy to educe the power to punish the conduct declared by these statutes to be unlawful.

It has been seen that, according to some authorities, the fugitive from labor, by the effect of the provision, is in the same status as in the State by whose laws he was held in bondage.

Mon. L. R. 159, and the indictments of Booth and Rycraft, given in 3 Wisc. 183; and of Bushnell and Langston, in 9 Oh. 77. The cases, *United States v. Morris*, 1 Curtis, 23, and *United States v. Stowell*, 2 ib. 153, were under other statutes, for obstructing the officer in executing legal process.

<sup>1</sup> 9 Oh. 215, Peck, J.:—"It is claimed that the law is unconstitutional because it interferes with the local police regulations of the State, and imposes severe pains and penalties upon citizens of the State where the fugitive is apprehended. These questions have not, that I am aware, been raised heretofore; but are, in my judgment, very easily answered. It, after all, resolves itself into a mere question of *power in Congress to legislate at all*, in regard to the reclamation of fugitives from service. If Congress has the power to regulate, by law, the demand and delivery of the alleged fugitive—to enforce the right of the owner and prohibit interference by others—it must necessarily follow that, to the extent deemed necessary for the enforcement of the right and its corresponding duty, Congress may constitutionally interfere with local police regulations of the several States, and, to render their regulations effective, must, necessarily, have the constitutional power to impose fines, imprisonment, and other sanctions upon a violation of the enactment."

<sup>2</sup> So, if Congress has power to legislate in reference to carrying into effect the 1st clause of the 2d section of the 4th Article, which relates to the privileges of citizens of the several States, it would be in harmony with this view to say that such legislation must be confined to the application of the judicial power in cases arising under that clause. Can Congress undertake to pass penal statutes to protect citizens of each State in the enjoyment of the rights guaranteed by that clause? The general statement, *ante*, § 863, may be modified in view of this section.



By combining this doctrine with the doctrine (if it is to be admitted) that a right given to private persons by the Constitution, operating as private law, may be guarded by the remedial legislation of Congress, it would easily follow that Congress has the power to enact any law suitable for the recovery of fugitive slaves;<sup>1</sup> and if it is also conceded that Congress may, by penal legislation, protect rights given by the Constitution, it would appear that Congress may go far towards re-enacting the various provisions of the slave codes of the slaveholding States, making a law of national extent, operating wherever a fugitive slave might be found.

But according to the view herein maintained, the provision only gives the person to whom the service is due a right to have the fugitive delivered up to him on claim made before public authority.<sup>2</sup> There is no right, then, to be protected, except as claim is made. Congress cannot organize a system for the return of fugitives without regard to claim made by their masters.

§ 955. In estimating the weight of judicial authority on the several questions considered in this chapter, it is to be remembered that the Supreme Court of the United States, in *Ableman v. Booth* (*ante*, p. 523), affirmed the Act of Congress to be, "in all its provisions, fully authorized by the Constitution of the United States."<sup>3</sup>

§ 956. In answering the principal objections taken against the law of 1850, the argument from a supposed *long acquiescence*, on the part of the people of the non-slaveholding

<sup>1</sup> The argument—the right of the claimant is given by national law, *therefore* it may be enforced by the legislation of Congress—is not uncommon, though it is not the received argument. It was, in fact, Mr. Clay's. See *ante*, p. 532.

<sup>2</sup> *Ante*, § 816.

<sup>3</sup> The opinion of Mr. Webster, as against the existence of power in Congress to legislate on the subject, has been cited *ante*, p. 533. The bill to amend the law of 1793, introduced by Mr. Webster in the Senate, June 3, 1850, provided for a trial by jury in the State in which the fugitive should be found. See 5 Webster's W. 372. But, in his speech to the Young Men of Albany, May 28, 1851, 3 Webster's W. 596, he maintained the validity of the law of 1850, though entirely on the ground of authority:—"Everywhere, on all occasions, and by all judges, it has been held to be, and pronounced to be, a constitutional law. \* \* All judicial opinions are in favor of this law. You cannot find a man in the profession in New York, whose income reaches thirty pounds a year, who will stake his professional reputation on an opinion against it. If he does, his reputation is not worth the thirty pounds."

States, with the law of 1793, as distinguished from judicial authority strictly so called, has often been insisted on. In estimating the force of this argument, it should be remembered that, when that law was enacted, slavery was lawful in almost every one of the States of the Union, and that in every such State delivery on claim might have been under the authority of the local or State law, independently of the authority of the Act of Congress, but substantially in the form authorized by that Act.<sup>1</sup> This local law for delivery of fugitives might have been judicially supposed to continue as customary law, even when in such a State the local slavery had ceased; and, in many of the cases in which a fugitive has been delivered on claim before a State judge or magistrate, the authority exercised may have been deemed to proceed from the State fulfilling a duty arising under the provision, according to the first construction.

If this argument, from long acquiescence, is advanced to support the power of Congress to legislate on the subject, it should be remembered that, as the powers of the Government are given by a written Constitution, no department can acquire power by prescription: for the Constitution is continuously promulgated, that is, at any one time it derives its authority from the then existing people of the United States.<sup>2</sup>

§ 957. The argument, for the validity of the Acts of Congress of 1793 and 1850, which lies in asserting the necessity of such legislation<sup>3</sup> may apply to any of their provisions. But it has been principally urged in supporting the action of the State magistrates and United States commissioners, and the summary proceeding without jury.

It is impossible that any argument, properly so called, in favor of the constitutionality of this legislation, can be founded on any supposed degree of necessity. It is, essentially, the justification of an admitted violation of the Constitution,

<sup>1</sup> Thus, in *Pennsylvania*, at the date of *Respublica v. Richards*, 2 Dallas, 234, and of *Johnson v. Tompkins*, 1 Baldwin's C. C. 571, the claimant could have, under the law of the State, all the remedy that he could have under the Act of Congress. See *ante*, pp. 70, 441.

<sup>2</sup> See Judge Sutliff, 9 Oh. 260.

<sup>3</sup> *Ante*, pp. 685, 729.



founded on the assertion of the unsuitableness of that instrument to certain ends arbitrarily assumed.<sup>1</sup>

The argument can be noticed here only by attempting to show how an Act might have been framed which should have satisfied the other requirements of the Constitution, while it also carried out the purposes of the provision for delivery of fugitives from labor.<sup>2</sup>

§ 958. And, first, as to the necessity of leaving the entire determination of the claim in the hands of a State magistrate<sup>3</sup> or a United States commissioner.

Admitting that the judges of the national courts were too few in number to bring the judicial power of the United States to bear promptly and efficiently on these cases, it is still not easy to see why the magistrates and commissioners might not have been empowered to act in these cases as the commissioners are empowered in the execution of the penal laws of the United States. They might have been authorized to commit, arrest, detain, or keep the person claimed as a fugitive from labor, who, then being in the custody of the United States and not in that of the claimant individually, should afterwards have been brought before some judicial officer capable of deciding the case in virtue of the judicial power of the United States,<sup>4</sup> or of the concurrent judicial power of some State; where the State might have consented to its exercise.

It may be urged, in reply, that this would only have facilitated the arrest and detention of the supposed fugitive, as the number of persons capable of deciding on the validity of the

<sup>1</sup> When, in this argument, the legislation is asserted to be *necessary*, the word has an extent given it beyond that of the words "necessary and proper," in the last clause of the 8th section of the 1st Article. See *ante*, p. 603.

<sup>2</sup> Judge Peck, who, in *Ex parte Bushnell*, &c., maintained the validity of the law, said, 9 Oh. 216:—"It seems, to us, that the law in question is unnecessarily severe in its sanctions, and should have been conceived in a milder and more humane spirit. More consideration ought to have been shown to the alleged fugitive in the ascertainment of his rights before his delivery to the claimant, and more respect evinced to the scruples, conscientious or otherwise, of the citizens of the State where he might be seized. It is not a question, whether the law is just and expedient, but whether it is constitutional. Not whether an admitted right to legislate has been *abused or improperly exercised*, but *whether such power exists*."

<sup>3</sup> Meaning some magistrate of a court of special jurisdiction, not capable of exercising the concurrent judicial power of the State. *Ante*, p. 652.

<sup>4</sup> That Judge Taney conceived of the *State magistrates* as acting thus under the law of 1793, see *ante*, § 874.

claim would not have been increased, and that the trouble and expense of removing the supposed fugitive from the locality of the magistrate or commissioner, to that of the judge, would have rendered the remedy nugatory.

But since, in the event of such fugitive's being finally delivered up on claim, a removal from the State in which he is found and taken is contemplated, it might be supposed that a person having authority judicially to determine the delivery on claim might be found either in the State in which the arrest takes place, or in that in which he is said to have been held to service, or in some intermediate State. The question here occurs—whether it is necessary, under the provision, when the delivery to the person to whom the service or labor is due is to be made by national authority, that it should be made in the State in which the supposed fugitive is arrested?

§ 959. This question may be pursued in connection with its parallel, which arises under the *second* inquiry—as to the necessity of summary proceedings, without a jury.

The necessity of summary proceedings on these claims is generally based on the assumption that, in the non-slaveholding States, juries, notwithstanding the evidence, would never or but seldom find that the person claimed had escaped from service to which he was held by the laws of another State,—being therein actuated either by a feeling of hostility towards the slaveholding States, or by opinions respecting the ethical character of those laws, leading them to regard the provision in the Constitution as void in *foro conscientiae*.

But, supposing this to be true, and that the fact may be considered by Congress in carrying the provision into effect, it does not appear but that, when the claim is to be determined by the judicial power of the United States, a trial by jury might be had in some locality other than the State in which the supposed fugitive is arrested.

If the arrest were made under the authority of the State in which the fugitive is found (proposing either to fulfill its obligations under the provision, according to the first construction, or to carry into effect the national municipal private law by exercising its concurrent judicial power), the judicial



determination of the claim, either with or without a jury, could take place only in that State. But, if the arrest is made under national authority in reference to a judicial determination of the claim by the same authority, there seems to be no such necessity that the national judicial power determining the claim should finally decide it and make the delivery in the State in which the arrest was made; or that, if a jury must co-operate with a judge holding that power, such jury should be empaneled in the State where the supposed fugitive is taken.

It is commonly urged by those who uphold the State laws, commonly called Personal Liberty Bills, which prohibit the removal of a person as a fugitive, unless after determination of the claim before a jury under the State law, that the trial must be in the State in which the supposed fugitive may be found, if the guarantee of jury trial has any force whatever. This is equivalent to saying that a fugitive cannot be delivered up on claim otherwise than by placing him in the custody of the claimant in the State in which such fugitive may be found.

But the law under which the right of the claimant and the obligation of the fugitive exist (whether it is found in the provision itself, operating as private law, or in the legislation of Congress) is national municipal law in authority and extent, though it has an international or *quasi*-international effect. This law will be equally enforced, whether the delivery is judicially determined in a locality under a State jurisdiction distinct from that over the locality in which the fugitive was arrested for the purpose of making the claim, or in the same locality. Under the national authority the two localities are included in one forum of jurisdiction. The locality in which the supposed fugitive is said to owe service and from which he is said to have escaped is, as to the facts to be proved, the *vicinage* and the natural *venue*.<sup>1</sup>

<sup>1</sup> Against this might be suggested an argument, by analogy, from the common-law rule that, on suit by the villein in one county and plea by the lord that the plaintiff is his villein-regardant in another, this issue shall be tried "in the county where the plaintiff hath conceived his action, and not in the county where the manor is: and this is in favor of liberty." 1 Co. Lit., fol. 125, a. And so it must

By a law which should provide for a transfer, by public authority, of the supposed fugitive to the jurisdiction from which he is said to have escaped, and a judicial determination of the claim in the same, the parallelism which has been supposed between these cases and the extradition of fugitives from justice would be established.<sup>1</sup>

If, after such a transfer, the claim is heard before a judge capable of holding the judicial power of the United States, and if a jury is given on the demand of either party, these constitutional guarantees will have been satisfied.<sup>2</sup>

A law which should thus allow a trial of the facts, when disputed, by a jury in the State by whose laws the person claimed is said to have been held to service or labor and from which he is said to have escaped has, on several occasions, been proposed in Congress. While the original bill for the law of 1850 was under consideration, the Senate Committee of Thirteen on the Compromise Measures of that year reported in favor of amending the bill by providing that such a trial might be had when the person carried back as a fugitive persisted in denying that he was a slave or owed service.<sup>3</sup> Mr. Underwood, of Kentucky, also introduced, as an amendment, a bill providing for such a trial in the State to which the reclaimed person should be taken, "to be conformable to the laws of the State in that behalf," which was rejected in the Senate, Aug. 23, 1850.<sup>4</sup>

have been where the lord commenced the contest by *nativo habendo*. This common-law rule would limit the judicial application of the provision in the absence of a statute (*ante*, § 827), but could hardly limit the legislative power of Congress.

<sup>1</sup> Compare *ante*, § 916.

<sup>2</sup> But the jury should be constituted under the sanctions of the English common law, as distinguished from the law of the slave State for the trial of similar issues. See *ante*, § 938.

<sup>3</sup> Mr. Clay was chairman of the committee, and advocated the measure in the Senate. See his remarks of May 13 and 21, 1850, in vol. 22, App. to Congressional Globe, 571, 612; and 2 Clay's Speeches, 459. The amendment to the bill appears to have been introduced in the committee by Mr. Cass, who also declared his opinion in favor of it in the discussion of August 26, 1852, which arose on Mr. Sumner's speech on his motion to repeal the Act of 1850. See vol. 25, App. Cong. Globe, 1124, 1125. Both Mr. Cass and Mr. Clay are said to have afterwards declared that they would have advocated such a provision. See Louisville Journal, May 11, 1850; Detroit Free Press, May, 1850. It does not appear that either of these senators thought such a provision essential to satisfy the requirements of the Constitution. The amendment to the bill was rejected in the Senate on the strenuous objection of Mr. Borland, of Arkansas, and other Southern senators.

<sup>4</sup> See Journals 1st Session 31st Cong. 576-579.



A bill, amending the fugitive-slave law by providing for such a trial in the Circuit Court of the United States in the State to which the reclaimed person shall be carried back, received the vote of a majority of the House of Representatives, March 1, 1861.<sup>1</sup>

During the same session, Mr. Douglas introduced a bill in the Senate to amend the existing Acts, which also, I believe, provided for such a trial.<sup>2</sup>

§ 960. In the exciting debates which preceded the adoption of the Compromise Measures of 1850, the provisions of the fugitive-slave law received little or no examination in either branch of the national Legislature.<sup>3</sup> On the occasion of Mr. Sumner's speech, on his motion to repeal the law, August 26, 1852, many other senators expressed opinions. So far as any argument in support of the law was then advanced, it rests on the assumptions that the action of the judge or commissioner is preliminary, and that the delivery of a fugitive on claim is not, in its legal aspects, distinguishable from the extradition of a fugitive from justice; while the power of Congress was supported either by the argument from necessity or by that from long acquiescence.

<sup>1</sup> House Bill No. 1009. It was read in the Senate for the first time only, March 2, 1861.

<sup>2</sup> Senate Bill No. 549. Jan. 28, 1861, read, by consent, the first and second times, and referred to the Judiciary Committee.

<sup>3</sup> Benton's *Thirty Years' View*, vol. 2, p. 780:—"The wonder is how such an Act came to pass, even by so lean a vote as it received: for it was voted for by less than half of the Senate, and by six less than the number of senators from the slave States alone. It is a wonder how it passed at all; and the wonder increases on knowing that, of the small number that voted for it, many were against it, and merely went along with those who had constituted themselves the particular guardians of the rights of the slave States, and claimed a lead in all that concerned them. These self-instituted guardians were permitted to have their own way, some voting with them unwillingly, others not voting at all. It was a part of the plan of 'compromise and pacification' which was then deemed essential to save the Union; and under the fear of danger to the Union on one hand, and the charms of pacification and compromise on the other, a few heated spirits got the control, and had things their own way."

## CHAPTER XXXI.

THE DOMESTIC INTERNATIONAL LAW OF THE UNITED STATES. THE SUBJECT CONTINUED. OF THAT PORTION OF THIS LAW WHICH IS IDENTIFIED WITH THE LAW OF SOME SEVERAL STATE. OF STATE LEGISLATION IN RESPECT TO FUGITIVES. OF THE POWER OF CONGRESS IN RESPECT TO THE DOMESTIC SLAVE TRADE. OF SOME QUESTIONS OF THE STATUS OF PERSONS AS DETERMINED BY THIS LAW.

§ 961. In the preceding ten chapters inquiry has been directed to the determination of rights and duties of private persons, in relations arising out of conditions of freedom and its contraries, by the *quasi*-international law of the United States identified in authority with the national municipal law. According to the method hereinbefore proposed, the next subject of investigation is the determination of rights and duties of private persons, in relations arising out of conditions of freedom and its contraries, by that branch of the domestic international law of the United States which, in authority, is identified with the local municipal law of the several States.<sup>1</sup>

Other topics have herein already been considered to an extent which precludes an equally full exposition of this branch of the main subject in the present volume. The State law having this international character can here be noticed only as it is that law which must determine a few prominent questions which, on reasoning given in the preceding chapters, are supposed not to be determined by the *quasi*-international law of the United States contained in the provisions of the fourth Article.

It results, from the assumption that in each State of the Union this international law derives its authority from the

<sup>1</sup> *Ante*, p. 233.



independent will of such State, that the statutes and decisions of the State which is the forum of jurisdiction must, in any particular case, be received as the best exponents of this law, as compared with the statutes and decisions of other States which may have been also promulgated as exponents of the same international law. But, in theory, this law, so far as it is common or unwritten law, may be regarded as one common to all the States of the Union: as the international private law customarily received in any one country is supposed to be a law received by all civilized countries, and, as this law, supposed to be common to all the States of the Union, may, in theory, be regarded as the international private law of the civilized world. In the absence of statutes and decisions of the State which is the forum of jurisdiction, the decisions of other States and other nations may be referred to.<sup>1</sup>

This State law may be derived, in part, from positive legislation. The State statutes relating to the condition of persons coming from other States have been indicated in the abstracts of the legislation of the several States given in the earlier chapters of this volume. It would be impossible here to present the customary or unwritten international law as it may be received in any one or more of the several States on any particular question noticed in this chapter. This customary or unwritten law can here be regarded only a law presumptively common to the several States. As such, it has, for the greater part, been already given in the exposition of the international private law of the colonies and States before the adoption of the Constitution.<sup>2</sup>

§ 962. The question as to the validity of State legislation for the purpose of carrying into execution the provisions of the second section of the fourth Article, in relation to fugitives from justice and from service or labor, may be presented as a question as to the classification of the topic under one or the other of the two branches of the domestic international law of the United States. Or the subject may be referred to the general inquiry hereinbefore stated<sup>3</sup>—by what means are these provisions to be made operative on private persons?

<sup>1</sup> *Ante*, § 388.

<sup>2</sup> See Chapters VII., VIII., IX., X.

<sup>3</sup> *Ante*, p. 421.

The authorities bearing on this question cannot here be classified. The Opinion of the Supreme Court, in *Prigg's case*, declaring absolutely null and void all State legislation in respect to the delivery of fugitives from labor on claim, has been very generally received as controlling authority;<sup>1</sup> though doubts as to the correctness of that doctrine have been very often expressed, even by those who have maintained the legislation of Congress.

This question is directly connected with that of the true construction of these provisions. If the first of the four constructions already indicated<sup>2</sup> were to be adopted, it would follow that the means of carrying them into effect are to be derived exclusively from State legislation. Under this construction, the subject could not be classified under the head of *quasi-international law* identified in authority with the national municipal law, under which head it has hereinbefore been treated. It would, under that view, be a topic of that international private law which in each State rests on the authority of the several State and is part of its local law.

If the second construction were adopted as the true basis of the legislation of Congress, it would be impossible to give an answer to this inquiry which should be consistent both with this construction and with the doctrine of *Prigg's case*. For, under this construction, it is assumed that the States must and can legislate, but will not; while the Supreme Court declares that they shall not, and, indeed, cannot, though they would.<sup>3</sup>

According to either adaptation of the third construction, the duty correlative to the right given by either provision is the duty of the national Government, and the States certainly cannot legislate to enforce any duty of the national Government, whether by carrying into execution the judicial power of the United States or otherwise.

According to the fourth construction, the provision operates

<sup>1</sup> 16 Peters, 622; *ante*, p. 475; *Kirk's Case*, 1 Parker's Cr. 67; *Richardson v. Beebe*, 9 Law Rep. 316; *Graves v. The State*, 1 Carter, 368; S. C., *Smith's Ind.* 258; *Donnell v. The State*, 3 Porter's Ind. 481; *Thornton's Case*, 11 Illinois, 332. But the State police power may be exerted. *Eells v. The People*, 4 Scammon, 498; *Landry v. Klopman*, 13 La. Ann. 345.

<sup>2</sup> *Ante*, p. 421.

<sup>3</sup> See *Smith, J.*, in 3 Wisc. 103; *ante*, p. 517, note.



as private law, independently of any legislation. This law is part of the law of each State, and the cases which arise under it, as such State law, must be applicable by the judicial power of the State. It would seem that the State might pass laws to carry into effect the judicial power of the State in such cases.

The State, by such legislation, could not interfere with the exercise of the judicial power of the United States applying the provisions as part of the national private law. But it would seem that the judicial power of the State, as directed by State legislation, and that of the United States, as directed by national legislation, might be concurrently exercised.<sup>1</sup>

§ 963. It would seem that a conflict of jurisdiction between the courts respectively applying this law in the exercise of the judicial power of the State and of the United States need not arise, if there be between them no conflict of opinion as to the right and correlative obligation to be maintained under it.

On a comparison of the statutes of the several States on this topic, an important distinction among them should be noticed. There are some which declare that persons claimed as fugitives from labor shall not be removed from the State by the claimants, except after a trial of the matters in issue before a court and jury, as in such statutes is provided.<sup>2</sup> These laws are in direct conflict with the law of Congress, and can be valid only if the law of Congress is unconstitutional in providing for such removal without such trial. The question of the validity of the State law turns on the question—does the provision give a right to remove on a summary proceeding before a commissioner, or does it give only a right to remove on a judicial determination of the claim before a jury?

There are other State laws which declare that no person shall be removed, as a fugitive from labor, except as provided either by such State law or by the law of Congress.<sup>3</sup> The

<sup>1</sup> *Ante*, §§ 443-447.

<sup>2</sup> See *ante*, laws of Massachusetts, p. 32; Vermont, p. 40; Michigan, p. 140; Wisconsin, p. 142.

<sup>3</sup> See *ante*, laws of New Hampshire, p. 36; New York, p. 60; New Jersey, pp. 64, 66; Pennsylvania, p. 73; Ohio, pp. 118-120; Indiana, p. 128; Illinois, pp. 135, 136; Michigan, p. 139; and California, p. 202. See also laws of Missouri, p. 169; Arkansas, p. 172; Iowa, p. 176; Kansas, p. 187; which even require the removal to be by the State law, and make no reference to the law of Congress as an alternative proceeding.

validity of these State laws does not depend upon the validity of the law of Congress, but upon the question whether the provision in the Constitution gives the claimant a right to seize the fugitive and remove him from the State without applying to any public functionary.

Bills of either of these classes might be called *bills for the protection of personal liberty*. They are all equally invalid, according to the Opinion delivered by Judge Story in *Prigg's* case. But it is herein held that, whether the State laws which oppose the execution of the law of Congress by requiring a trial by jury in the State courts are, or are not, valid, statutes of the other class are in perfect harmony with the Constitution.<sup>1</sup>

§ 964. A similar question, as to the classification of the topic under one or the other of the two branches of the domestic international law of the United States, is presented in connection with the question which has been mooted—whether the exportation and importation of slaves, for sale, from and into the several States, or what is called the domestic slave trade, may be regulated by the legislation of Congress, to the exclusion of State law?

\* Congress has not, as yet, enacted any law for this purpose. It is needless to refer to the statutes of the several States which may be said to relate to this trade. In *Groves v. Slaughter* (1841), 15 Peters, 449, the question was raised—whether “the provision of the Constitution of the United States which gives the regulation of commerce to Congress did not interfere with the provision of the constitution of the State of Mis-

<sup>1</sup> The argument is given *ante*, pp. 569–579. In *Prigg's* case it was admitted that the claimant may be interrupted by a civil suit in trespass or of replevin, and must suffer in damages if he fails to prove his claim on trial. The court would not probably have denied that he might be indicted for kidnapping, and found guilty, if the person carried off by him was not a fugitive within the meaning of the provision. These remedies against unlawful seizure and removal are given by the State law—common or unwritten, it may be, but State law, in origin and authority, as much as the statute law. Thus, the court held that the State may protect the liberty of its inhabitants, but may not express its will in a statute. See *ante*, p. 728, note. It has been intimated that Congress may legislate to carry into execution the provision guaranteeing the privileges of citizens of each State in the other States. *Ante*, §§ 688–689. It would be in harmony with *Prigg's* case to hold that the States have no power to legislate for the purpose of securing those privileges. Would it be also in harmony with that case to hold that the States have no other juridical power or authority in respect to that subject?



issippi which relates to the introduction of slaves as merchandise or for sale?"<sup>1</sup>

The court held that the question was not involved in this case (ib. 504, 508). But Justices Story, Thompson, Wayne, and McKinley, are said (ib. 510) to have "concurred with the majority" in holding that the power to regulate commerce does not give power to Congress in reference to this subject.

Judge McLean, in a separate Opinion, held that Congress had no power in the matter, and derived this conclusion from the proposition that slaves are persons, and not property, in view of the Constitution and laws of the United States.<sup>2</sup>

Chief Justice Taney delivered a separate Opinion, in which he held that the power was exclusively with the States, but expressly declared that he did not think proper to argue the question.<sup>3</sup>

Judge Baldwin delivered a separate Opinion, in which he dissented from the Opinion of the court, and held that the power was in Congress.<sup>4</sup> He derived this conclusion from the

<sup>1</sup> *Ante*, p. 147, n. 2.

<sup>2</sup> McLean, J., 15 Peters, 506:—"Can the transfer and sale of slaves from one State to another be regulated by Congress under the commercial power?"

"If a State may admit or prohibit slaves at its discretion, this power must be in the State and not in Congress. The Constitution seems to recognize the power to be in the States. The importation of certain persons—meaning slaves—which was not to be prohibited before 1808, was limited to such States then existing as shall think proper to admit them. Some of the States, at that time, prohibited the admission of slaves, and their right to do so was as strongly implied by this provision as the right of other States that admitted them.

"The Constitution treats slaves as persons." See the remainder of the passage cited *ante*, p. 571, note 2.

<sup>3</sup> *Ib.*, 508, Taney, Ch. J.: "I had not intended to express an opinion upon the question raised in the argument in relation to the power of Congress to regulate the traffic in slaves between the different States, because the Court have come to the conclusion, in which I concur, that the point is not involved in the case before us. But as my Brother McLean has stated his opinion upon it, I am not willing, by remaining silent, to leave any doubt as to mine.

"In my judgment, the power over this subject is exclusively with the several States; and each of them has a right to decide for itself, whether it will or will not allow persons of this description to be brought within its limits, from another State, either for sale or for any other purpose; and, also, to prescribe the manner and mode in which they may be introduced, and to determine their condition and treatment within their respective territories; and the action of the several States upon this subject cannot be controlled by Congress, either by virtue of its power to regulate commerce, or by virtue of any other power conferred by the Constitution of the United States. I do not, however, mean to argue this question; and I state my opinion upon it on account of the interest which a large portion of the Union naturally feel in this matter, and from an apprehension that my silence,

proposition that slaves, in view of the Constitution and laws of the United States, are property, and not persons.<sup>1</sup>

Although Judge Baldwin's views do not appear to have been supported on this occasion by any other member of the court, his language is deserving of especial notice as the juris-

when another member of the court has delivered his opinion, might be misconstrued.

"Another question of constitutional law has also been brought into discussion; that is to say, whether the grant of power to the general Government, to regulate commerce, does not carry with it an implied prohibition to the States to make any regulations upon the subject, even although they should be altogether consistent with those made by Congress.

"I decline expressing any opinion upon this question, because it is one step further out of the case really before us; and there is nothing in the character of the point that seems to require a voluntary declaration of opinion by the members of the Court."

<sup>1</sup> 15 Peters, 513, immediately after the passage cited *ante*, p. 571, note 2, Judge Baldwin says:

"It was a principle of the Revolution and the practical construction of the Declaration of Independence, that 'necessity or expediency' justified 'the refusal of liberty in certain circumstances to persons of a particular color,' and that those to whom their services and labor were due were their 'owners.' 1 Laws U. S., 24, 25." The judge then refers to the provisions respecting "negroes or other property," in the first treaty of peace with Great Britain (ib. 198, 204), and to the words, "slaves or other private property," in the treaty of Ghent.

The judge then says:—"At the adoption of the Constitution, slaves were as much the subjects and articles of 'commerce with foreign nations,' and among the several States, as any other species of merchandise; they were property for all purposes and to all intents; they were bought and sold as chattels," &c. Then, referring to the limitation against prohibition of the importation of slaves from abroad before 1808, the judge, arguing that the power to abolish the foreign slave trade must be incidental to the power of legislation over commerce with foreign nations, intimates that it necessarily follows that slaves must be regarded as property in order to justify the legislative prohibition of the African slave trade, and goes on to say:—"Slaves then being articles of commerce with foreign nations up to 1808, and until their importation was prohibited by Congress, they were also articles of commerce among the several States, which recognized them as property capable of being [515] transferred from hand to hand as chattels. Whether they should be so held or not, or what should be the extent of the right of property in the owner of a slave, depended on the law of each State; that was and is a subject on which no power is granted by the Constitution to Congress; consequently none can be exercised, directly or indirectly. It is a matter of internal police, over which the States have reserved the entire control; they, and they alone, can declare what is property capable of ownership absolute or qualified; they may continue or abolish slavery at their pleasure, as was done before and has been done since the Constitution, which leaves this subject untouched and intangible except by the States.

"As each State has plenary power to legislate on this subject, its laws are the test of what is property; if they recognize slaves as the property of those who hold them, they become the subjects of commerce between the States which so recognize them, and the traffic in them may be regulated by Congress, as the traffic in other articles, but no farther. Being property by the law of any State, the owners are protected from any violations of the rights of property by Congress, under the fifth Amendment of the Constitution; these rights do not consist merely in ownership; the right of disposing of property of all kinds is incident to



tical precursor of the doctrines afterwards judicially proclaimed in *Dred Scott's* case.

This portion of Judge Baldwin's Opinion might have been cited in a former chapter as an extra-judicial dictum bearing on the question of the right of the citizens of slaveholding

it, which Congress cannot touch. The mode of disposition is regulated by the State or common law, and but for the 1st clause, the 2d section of the 4th Article of the Constitution of the United States, a State might authorize its own citizens to deal in slaves and prohibit it to all others. But that clause secures to the citizens of all the States 'all privileges and immunities of citizens' of any other State, whereby any traffic in slaves or other property, which is lawful to the citizens or settlers of Mississippi, with each other, is equally protected when carried on between them and the citizens of Virginia. Hence it is apparent that no State can control this traffic, so long as it may be carried on by its own citizens, within its own limits; as part of its purely internal commerce, any State may regulate it according to its own policy; but when such regulation purports to extend to other States or their citizens, it is limited by the Constitution putting the citizens of all on the same footing as their own. It follows, likewise, that any power [516] of Congress over the subject is, as has been well expressed by one of the plaintiff's counsel, conservative in its character, for the purpose of protecting the property of the citizens of the United States, which is a lawful subject of commerce among the States, from any State law which affects to prohibit its transmission for sale from one State to another, through a third or more States. \* \* \* If the owner of slaves in Maryland, in transporting them to Kentucky or Missouri, should pass through Pennsylvania or Ohio, no law of either State could take away or affect his right of property; nor, if passing from one State to another, accident or distress should compel him to touch at any place within a State where slavery did not exist. Such transit of property, whether of slaves or bales of goods, is lawful commerce among the several States, which none can prohibit or regulate, which the Constitution protects and Congress may and ought to preserve from violation. Any reasoning or principle which would authorize any State to interfere with such transit of a slave would equally apply to a bale of cotton or cotton goods; and thus leave the whole commercial intercourse between the States liable to interruption or extinction by State laws or constitutions. \* \* \* Where no object of police is discernable in a State law or constitution, nor any rule of policy other than that which gives to its own citizens a 'privilege' which is denied to citizens of other States, it is wholly different. The direct tendency of all such laws is partial, anti-national, subversive of the harmony which should exist among the States, as well as inconsistent with the most [517] sacred principles of the Constitution, which, on this subject, have prevailed through all time, in and among the colonies and States, and will be found embodied in the second resolution of the Virginia Legislature, in 1785, 1 Laws of U. S., 53. For these reasons, my opinion is, that had the contract in question been invalid by the constitution of Mississippi, it would be valid by the Constitution of the United States. These reasons are drawn from those principles on which alone this government must be sustained; the leading one of which is that, wherever slavery exists by the laws of a State, slaves are property in every constitutional sense, and for every purpose, whether as subjects of taxation, as the basis of representation, as articles of commerce, or fugitives from service. To consider them as persons merely, and not property, is, in my settled opinion, the first step towards a state of things to be avoided only by a firm adherence to the fundamental principles of the State and federal Governments, in relation to this species of property. If the first step taken is a mistaken one, the successive ones will be fatal to the whole system. I have taken my stand on the only position which, in my judgment is impregnable, and feel confident in its strength, however it may be assailed in public opinion here or elsewhere."

States to hold slaves during temporary sojourn within the limits of a State in which the status of slavery is not recognized by the local law.<sup>1</sup> It will be noticed that Judge Baldwin first made the law of some one State the standard of whatever may be recognized in that State as the object of commerce under the Constitution, and then made the law of the State of the citizen's domicile the standard of those privileges and immunities of citizenship to which, under the provision in the fourth Article, he is entitled in every other State.

The question, of the power of Congress in respect to the domestic slave trade, will not here be examined on principle; except by observing that, so far as its answer depends on the question, whether slaves are or are not property, it will be consistent with the conclusions arrived at in discussing other questions in this work to say that, in their transfer from one State to another, slaves must, in view of the national law, always be regarded as persons. Whether the transportation of persons from one State to another can be regarded as a subject of that commerce between the States which, by the Constitution, is within the legislative power of Congress, is a question which will not be here examined.<sup>2</sup>

§ 965. It has been already remarked that the claim of an owner, being a citizen of some State, to slave property in some other State in which he appears as a domestic alien, may be urged, *first*, as supported by the guarantee to the citizens of each State, in the first paragraph of the second section of the fourth Article, of the privileges of citizens in the several States; or, *second*, as a special case, supported by the fugitive-slave provision in the third paragraph of the same section. To complete the examination of the various grounds on which such a claim has been urged, it remains to examine, *thirdly*, how far the same be supported by that private international law which, in each State, is identified in authority with the local law, the effect of which on conditions of freedom and its contraries is considered in this chapter.

<sup>1</sup> *Ante*, § 671.

<sup>2</sup> On this question, see the various judicial opinions in *The Passenger Cases*, 7 Howard, 283-573, and the note *ante*, p. 340.



This law may be in part derived from the positive legislative enactment of the State. The State statutes which may affect the international recognition of slavery, or of rights of ownership in respect to slaves, in the several States, have been given in the abstracts of State statutes. It remains only to consider how far the claim above spoken of may be supported by private international law, as ordinarily received, having in each State the character of customary or unwritten law.<sup>1</sup>

On the supposition that the case of fugitive slaves is to be determined exclusively by the constitutional provision and the laws of Congress, the claim above spoken of is only to be considered as occurring when slaves may have been brought, with their master's consent, from the State by whose laws they had been held to service, into some other State.

On the supposition that the several States may be distinguished as slaveholding or non-slaveholding, and that in each of the slaveholding States the owner domiciled in some other slaveholding State may, by the customary international law, remove the slave whom he has brought with him voluntarily, or without any overruling necessity, for temporary stay or sojourn, the claim above spoken of is only to be considered as occurring when slaves have been brought by their master's consent from some State by whose laws they had been held to service, into some non-slaveholding State.

The authorities bearing on this question cannot be here given fully and in proper order of time, or critically examined. But it may be noticed, as a consequence of the fact that the law which in any one State is to determine the question when it arises depends solely on the several will of such State, that the decisions of the courts of the non-slaveholding States are those from which only the general rule can be derived.<sup>2</sup>

The cases bearing most directly on this question have already been cited in considering whether this claim of an owner, being a citizen of a slaveholding State, is supported by any provision in the fourth Article of the Constitution.<sup>3</sup> It

<sup>1</sup> See the statement, *ante*, § 671.

<sup>2</sup> *Dicta* of courts of slaveholding States on this subject, e. g., in *Rankin v. Lydia*, 2 A. K. Marshall, 477, cannot be considered, however positive or unanimous.

<sup>3</sup> See, as supporting the claim, the case of Sewall's slaves, 3 Am. Jur. 404, and VOL. II.—49





It would seem that, if overruling physical necessity and want of consent on the part of the owner will lead to the recognition of the owner's claim in these cases, the claim ought, on the same principle, to be recognized when the slave has come into the non-slaveholding State by escaping secretly, or by violence, from the State where he had been held in slavery. There is in this case as much of overruling physical necessity, so far as the master is concerned, and want of consent on his part, as in the other. But it is admitted that the master's claim to such fugitive rests exclusively on the provision in the Constitution, and would not be recognized on any other ground.<sup>1</sup>

The argument against recognizing the claim as it might have been made in England or Massachusetts before the adoption of the Constitution of the United States, which was offered in the first volume of this work,<sup>2</sup> applies with equal or greater force against the recognition of the claim in any State of the Union in which the State law can be judicially understood as attributing the right of personal liberty *universally*, except as limited by the Constitution of the United States. It is herein supposed that in Massachusetts and New York, and in most of the non-slaveholding States, the recognition of such claim

absence of any decisions, cannot be here examined—suggests itself, as to the status of slaves, from one of the slaveholding States, being on board an American vessel on the high seas or beyond the jurisdiction of any State. Compare *Polydore v. Prince*, Ware's Rep., 410.

<sup>1</sup> Story's Conflict of Laws, § 96, and cases.

<sup>2</sup> *Ante*, Ch. VIII., IX. In recent discussions on this topic the law of Prussia has been referred to, and particularly the case of the negro Marcellino, in 1854, whom Dr. Ritter had brought with him from Brazil to Berlin and there claimed to own as a slave, with power to take him back against his will. See the speech of Mr. Sandidge, of Louisiana, in Ho. of Rep., Jan. 17, 1857, in *National Intelligencer*, Feb. 12, 1857; 1 Cobb on Slavery, 182. The negro brought an action for defamation. The material point in the decisions rendered was, that a person brought from a country where he had been held as a slave might be held as such, in Prussia, by an alien owner sojourning for a limited period. This appears to have been founded on the provision of the Civil Code of Prussia, *Allgemeines Landrecht*, Theil II., titel 5, § 198, which, translated, is, "Strangers, who are in the king's dominions for a brief period only, retain their rights over the slaves brought with them." I have the certificate of Dr. Heffter, Professor of Law in the University of Berlin, that the law on this point has been changed by an enactment of March 9, 1857, which, translated, is as follows:—"§ 1. Slaves become free from and after the instant they stand on Prussian territory. The master's right of property is from that time extinguished. § 2. All provisions of law contrary to this enactment, and particularly §§ 198-208 of Part II., tit. 5, of the *Allgemeines Landrecht*, are hereby repealed."

by a judicial tribunal is precluded by such a universal attribution of the right of personal liberty.<sup>1</sup>

§ 967. On the assumption that the slaveowner's claim in these cases is not protected by any provision of the Constitution, it follows that, whatever may be the doctrine under unwritten private international law, it is always competent for the local legislature to declare the slave free, or to prohibit the recognition of the claim to ownership.<sup>2</sup>

§ 968. The question as to the status of a person who returns to the State in which he had previously been held as a slave, from one of the free States into which he had passed with the consent of his former owner, is one which, in the particular case, is determined by law deriving its authority solely from the several will of the State which is the forum of jurisdiction. Hence, the only general rule of customary or unwritten private international law in such cases is that which may be gathered from the decisions of the courts of the slaveholding States.<sup>3</sup>

<sup>1</sup> This attribution of the right of personal liberty to *all persons* within the forum is entirely distinct from a recognition of the right as given by universal law, or a law which prevails everywhere, or which ought to prevail everywhere, as an immutable law of nature. Lord Mansfield's failure to make this distinction has rendered his opinion in *Somerset's case* open to criticism (see *ante*, Vol. I, pp. 192, 376). The tribunal's refusal to recognize the master's claim in this case is not inconsistent with its judicial recognition of the lawfulness of slavery in other jurisdictions, or even its enforcement of rights and obligations growing out of its existence in such jurisdictions (which inconsistency was asserted in Mr. O'Connor's argument, 20 N. Y. 570-572). "It is quite a different question, how far rights acquired and wrongs done to slave property, or contracts made respecting property in countries where slavery is permitted, may be allowed to be redressed or recognized in the judicial tribunals of governments which prohibit slavery." Story, *Conf. § 96, a*.

<sup>2</sup> *Ante*, § 683. The authorities and argument, that the claim of the owner in these cases is not supported by the constitutional guarantee of the privileges and immunities of citizens in the fourth Article, has been presented, *ante*, §§ 672-683. The question, whether the claim is to be determined by national or local law, was incidentally noticed in *Dred Scott's case*. Mr. Justice Nelson, 19 Howard, 468, said: "The question has been alluded to, on the argument, namely, the right of the master, with his slave, of transit into or through a free State, on business or commercial pursuits, or in the exercise of a federal right, or the discharge of a federal duty, being a citizen of the United States, which is not before us. This question depends upon different considerations and principles secured to a common citizen of the Republic under the Constitution of the United States. When that question arises we shall be prepared to decide it."

<sup>3</sup> This was not understood by the majority of the court in *Anderson v. Poin-dexter*, 6 Ohio, 622, holding that they would not recognize the defendant as a slave in Kentucky, at the time of making the contract sued on, because he had been allowed to go for temporary purposes into Ohio; though they acknowledged



§ 969. Until the decision of the Missouri court in *Dred Scott v. Emerson*, 15 Missouri, 576,<sup>1</sup> the courts of the slaveholding States supported with great uniformity the doctrines, that he is not to be deemed free, in the State in which he had been held as a slave, who returns to it or is brought back from a free State into which he had been taken or sent on a *bona fide* visit or temporary sojourn by his owner or master; and, on the other hand, that he is to be deemed free in the slaveholding State who returns or is brought back from a free State into which he had been carried or sent, either to reside there *animo morandi*, or to be hired out there for the master's benefit with intent to evade the State law prohibiting slavery or the introduction of slaves.<sup>2</sup>

The cases undoubtedly exhibit varieties of opinion as to what residence on the part of the slave in the non-slaveholding jurisdiction shall, in the slaveholding forum, on his return, be regarded as sufficient to give him a domicile, in the former, upon which a status of freedom may accrue to him which can be recognized under the customary rules of private international law.<sup>3</sup>

that, by the law as generally received in the slaveholding States, such temporary visits would not have been considered as changing his condition in Kentucky.

<sup>1</sup> Affirmed in 15 Missouri, 595, and 17 ib., 434.

<sup>2</sup> It is unnecessary to classify the cases as supporting one or the other of the doctrines above stated. The two classes of cases incidentally confirm each other. See *Virginia cases*: Griffith v. Fanny, Gilmer, 144; Lewis v. Fullerton, 1 Randolph, 15; Hunter v. Fulcher, 1 Leigh, 172; Betty v. Horton, 5 Leigh, 615; Commonwealth v. Pleasant, 10 Leigh, 697. *Maryland cases*: Mahoney v. Ashton, 4 Har. & McHenry, 295-325; David v. Porter, 4 Har. & McHenry, 418; Stewart v. Oakes, 5 Har. & Johnson, 107, note. *Kentucky cases*: Rankin v. Lydia, 2 A. K. Marshall, 467; Bush's Rep. v. White, 3 Monroe, 104; Graham v. Strader, 5 B. Monroe, 181; Strader v. Graham, 7 ib., 635; Davis v. Tingle, 8 ib., 545; Collins v. America, 9 ib., 565; Mercer v. Gilman, 11 ib., 211; Maria v. Kirby, 12 ib., 542; Ferry v. Street, 14 ib., 358. *A South Carolina case*: Guillemette v. Harper, 4 Rich., 187. *Louisiana cases*: Lunsford v. Coquillon, 14 Martin, 401; Louis v. Cabarrus, 7 La., 170; Marie Louise v. Marot, 8 La., 479; Frank v. Powell, 11 La., 499; Priscilla Smith v. Smith, 13 La., 445; Elizabeth Thomas v. Generis, 16 La., 483; Josephine v. Poulney, 1 La. Ann., 322; Arsene v. Pigneguy, 2 ib., 620; Liza v. Puissant, 7 ib., 80. The alteration of the rule by the Legislature, in 1846, is noticed in Eugene v. Preval, 2 La. Ann., 180; Conant v. Guisnard, ib., 696. *Missouri cases*: Winny v. Whitesides, 1 Missouri, 472; La Grange v. Chouteau, 2 ib., 19; Milly v. Smith, 2 ib., 36; Ralph v. Duncan, 3 ib., 195; Julia v. McKinney, 3 ib., 270; Nat v. Ruddle, 3 ib., 400; Rachel v. Walker, 4 ib., 350; Wilson v. Melvin, 4 ib., 592; Vaughan v. Williams, 3 McLean, 530; Robert v. Melugen, 9 Missouri, 169, and the dissenting opinion of Gamble, Ch. J., in *Dred Scott v. Emerson*, 15 Missouri, 576.

<sup>3</sup> Ante, §§ 54, 121, 320: In Mahoney v. Ashton (1799), 4 Har. & McHen., 295-

Domicil is a topic which it is difficult to bring within fixed rules.<sup>1</sup> It may be supposed that some intention on the part of the slave to acquire free status under the law of the non-slaveholding State should appear, in order that he should be regarded as free on revisiting the forum in which he had been a slave.<sup>2</sup> In instances where the stay of master and slave has been protracted, and, to all appearance, in view of residence, it seems difficult to recognize the slavery on the return, though the slave may have continued to serve voluntarily, without assuming that slavery has existed during the interval in a State where there was no law to support it. On the other hand, it may be equally unreasonable to recognize a status of freedom as acquired by any assertion of liberty during a very brief stay in the State whose law accords it.

The instances which most occasion doubt seem to be those in which, on the occasion of *bona fide* visit, transit, or temporary residence in a non-slaveholding State, the slave has claimed his freedom and it has been judicially awarded to him by a court of such State. The courts of the slaveholding States are generally unwilling to recognize the party as free on returning to the jurisdiction in which he had been held as a slave.<sup>3</sup>

§ 970. In the case of *Dred Scott v. Emerson*, 15 Missouri (1852), 576, the Supreme Court of Missouri avowedly aban-

325, the claim for freedom was based on the fact that the petitioner's ancestor had been taken from Barbados to England and brought thence to Maryland between the years 1678 and 1681. The decision against the claim is based on the idea that a slave did not become a free person at that time in England, and also that the Maryland statute of 1715 would have re-established a condition of slavery. The arguments and opinions show the conflict of opinion as to the law of England, as expounded in the then recent case of *Somerset*.

<sup>1</sup> Phillimore on Domicil, 15.

<sup>2</sup> Compare *ante*, § 320. In *Commonwealth v. Aves*, 18 Pick., 218, Judge Shaw said: "From the principle above stated, on which a slave brought here becomes free, to wit, that he becomes entitled to the protection of our laws, it would seem to follow, as a necessary conclusion, that if the slave waives the protection of these laws and returns to the State where he is held as a slave, his condition is not changed." See also the distinction made, and cases noted, by Curtis, J., 19 How., 591, 592. Also President Tucker's Opinion in *Betty v. Horton*, *ante*, p. 28, note. Argue from *Calvert v. Steamboat Timoleon*, 15 Missouri, 596.

<sup>3</sup> *Davis v. Jaquin*, 5 Har. & Johns., 100, 109; *Lewis v. Fullerton*, 1 Rand., 15; *Maria v. Kirby*, 12 B. Monroe, 549. The slave having been carried out of the slaveholding State, in order to effect emancipation, contrary to the law of the State, it was not recognized in *Hinds v. Brazealle*, 2 How. Mississippi, 837; *Shaw v. Brown*, 35 Mississippi, 246; *Mary v. Brown*, 5 La. Ann., 269.



doned the customary rule of international private law as declared in the earlier decisions of the same court. The ground on which this decision was made is especially to be noticed as exhibiting the unjuridical character of that doctrine of judicial comity, or of the comity of the nation or state applied by its courts, which in the second chapter of this work has been presented as contrary to all sound views of international law.

The essential facts in the case were, that Dr. Emerson, a surgeon in the army of the United States, during his continuance in the service was stationed at Rock Island, a military post in the State of Illinois, and at Fort Snelling, also a military post in the territory of the United States, north of the northern line of the State of Missouri; at both of these places Scott continued in the service of Dr. Emerson—at one place from the year 1834 until April or May, 1836, at the other from the period last mentioned until the year 1838.

The Missouri court, in this case, regarded the owner of the slave as having, for the purposes of this case, resided in a non-slaveholding jurisdiction *animo morandi*, and they admitted, or at least did not deny, that the rule of international private law, as gathered from their own previous decisions, declared the plaintiff free in Missouri.

But the majority of the court<sup>1</sup> thought themselves at liberty

<sup>1</sup> Scott (a man of color) v. Emerson (1852), 15 Missouri, 576. Caption: "The voluntary removal of a slave by his master to a State, territory, or county in which slavery is prohibited, with a view to residence there, does not entitle the slave to sue for his freedom in the courts of this State." Held by Judges Scott and Ryland. Chief Justice Gamble dissented. In the opinion delivered by Judge Scott (ib. 584), he held that, by recognizing the plaintiff as a freeman, the Missouri court would be enforcing the law of another State or jurisdiction. "It is a humiliating spectacle to see the courts of a State confiscating the property of her own citizens by the command of a foreign law. If Scott is freed, by what means will it be effected but by the constitution of the State of Illinois or the territorial laws of the United States? Are not those governments capable of enforcing their own laws? and, if they are not, are we concerned that such laws shall be enforced, and that, too, at the cost of our own citizens?" Then, referring to the law of the non-slaveholding States: "Now, are we prepared to say that we shall suffer those laws to be enforced in our courts?"

On the doctrine of comity Judge Scott has the following (ib., p. 586): "An attempt has been made to show that the comity extended to the laws of other States is a matter of discretion, to be determined by the courts of that State in which the laws are proposed to be enforced. If it is a matter of discretion, that discretion must be controlled by circumstances. Times now are not as they were when the former decisions on this subject were made. Since then, not only individuals, but States have been possessed with a dark and fell spirit in relation to slavery, whose gratification is sought in the pursuit of measures whose inevitable

to adopt, as a rule for this particular case, that which they conceived the State of Missouri ought to adopt in such matters, at that time, in view of certain considerations of *comity*, or want of *comity*, in respect to certain other States—not the State or jurisdiction in which the plaintiff had resided in particular, but the non-slaveholding States of the Union generally—as having been wanting in *comity* in respect to certain States—not the State of Missouri in particular, but the slaveholding States of the Union generally.<sup>1</sup> In view of the “spirit in relation to slavery” exhibited in some States not named (but being, it may be supposed, States on the eastern seaboard, since they, or the ancestors of their present inhabitants, are charged with having introduced slavery into the continent, if not into the Louisiana Territory specifically), the court refused to recognize the status conferred upon the negro, Dred Scott, by the law of Congress in an adjacent Territory of the United States west of the Mississippi, or by the law of the adjacent State of Illinois.

§ 971. The case of *Dred Scott v. Sandford*, instituted in the United States Circuit Court, and brought up (from the judgment of that court sustaining the demurrer to the plea in abatement that the plaintiff was not a citizen of Missouri, because a negro of African descent) by writ of error to the Supreme Court of the United States, arose on the same facts. 19 How., 396, 453.

The Opinions in this case on the question whether a negro can be a citizen of one of the United States, in view of the first clause of the second section of the fourth Article, have been considered in a former chapter. This question has been distinguished from that of the capacity of a negro to be a party

consequence must be the overthrow and destruction of our government. Under such circumstances, it does not behoove the State of Missouri to show the least countenance to any measure which might gratify this spirit. She is willing to assume her full responsibility for the existence of slavery within her limits, nor does she seek to share or divide it with others. Although we may, for our own sakes, regret that the avarice and hard-heartedness of the progenitors of those who are now so sensitive on the subject ever introduced the institution among us, yet we will not go to them to learn law, morality, or religion on the subject.”

<sup>1</sup> On the question how, in applying the doctrine of *comity* as ordinarily received, the *comity* of the State or the policy of the State is to be judicially ascertained in cases of this class, see *Mitchell v. Wells*, 37 Mississippi, 235, 237.



to a suit coming within the judicial power of the United States, which has been noticed in another place.<sup>1</sup> But, in view of the proposition that the plaintiff could not sue as a citizen of Missouri because he was a slave by the law of that State, the question of his status under the law of that State was examinable under the issue on the plea in abatement.

In the Opinion delivered as that of the court, on concluding that the prohibition of slavery in the territory north and west of Missouri was inoperative, 19 How., 452, immediately after the portion cited *ante*, vol. I., p. 530, Chief Justice Taney adds: "and that neither Dred Scott himself, nor any of his family, were made free by being carried into this territory, even if they had been carried there by the owner with the intention of becoming a permanent resident." The Chief Justice next very briefly examines the question whether, "as contended on the part of the plaintiff, he is made free by being taken to Rock Island, in the State of Illinois, independently of his residence in the territory of the United States, and, being so made free, he was not again reduced to a state of slavery by being brought back to Missouri." Judge Taney refers to *Strader v. Graham*, 10 How., 82—"that this court had no jurisdiction to revise the judgment of a State court upon its own laws"—as authority for saying: "So in this case. As Scott was a slave when taken into the State of Illinois by his owner, and was there held as such, and brought back in that character, his *status*, as free or slave, depended on the laws of Missouri, and not of Illinois. It has, however, been urged in the argument that, by the laws of Missouri, he was free on his return, and that this case, therefore, cannot be governed by the case of *Strader et al. v. Graham*, where it appeared, by the laws of Kentucky, that the plaintiffs continued to be slaves on their return from Ohio."<sup>2</sup> But whatever doubts or opinions may, at one time, have been entertained upon this subject, we are sat-

<sup>1</sup> *Ante*, § 372.

<sup>2</sup> Here the Chief Justice seems to intimate that the Supreme Court had, in *Strader v. Graham*, not only accepted the decision of the Kentucky court as the exposition of *Kentucky law*, but also made the rule of Kentucky law a general rule, applicable in Missouri and other States.

isified, upon a careful examination of all the cases decided in the State courts of Missouri referred to, that it is now firmly settled, by the decisions of the highest court in the State, that Scott and his family, upon their return, were not free, but were, by the laws of Missouri, the property of the defendant; and that the Circuit Court of the United States had no jurisdiction, when, by the laws of the State, the plaintiff was a slave, and not a citizen."<sup>1</sup>

The judge proceeds to argue that the decision of the State court on the question of the status of these particular parties must be conclusive on the Supreme Court, even if erroneous, unless brought up before it for correction on writ of error.

§ 972. Mr. Justice Nelson delivered an Opinion, in which he exclusively considered this question of international law as the only one material to the determination of the case.<sup>2</sup>

Judge Nelson, *ib.* 458, thus states the question: "Whether or not the removal of the plaintiff, who was a slave, with his master, from the State of Missouri to the State of Illinois, *with a view to a temporary residence*, and, after such a residence and return to the slave State, such residence in the free State works an emancipation." Taking this view of the question of residence, Judge Nelson could regard<sup>3</sup> the decision of the State

<sup>1</sup> In the syllabus of the report, drawn, it is said, by the Chief Justice, is—V., 2—"It has been settled by the decisions of the highest court in Missouri that, by the laws of that State, a slave does not become entitled to his freedom, where the owner takes him to reside in a State where slavery is not permitted, and afterwards brings him back to Missouri."

<sup>2</sup> It is remarkable that though, in the opening sentence, Judge Nelson spoke in the first person singular, he employed the plural throughout in the residue. Among the other Opinions, the plural is employed only in that delivered by the Chief Justice. May it be surmised that this Opinion was prepared to be delivered as the Opinion of the court? The judgment of the court might have been sustained on the grounds taken in this Opinion. In view of a state of public feeling attributable, in a great degree, to the doctrines expressed, on other points, in the Opinion delivered by the Chief Justice, it may be regretted that Judge Nelson's was not adopted as the exponent of the court.

<sup>3</sup> *Ib.* 466. "It is said, however, that the previous cases and course of decision in the State of Missouri on this subject were different, and that the courts had held the slave to be free on his return from a temporary residence in the free State. We do not see, were this to be admitted, that the circumstance would show that the settled course of decision, at the time this case was tried in the court below, was not to be considered the law of the State. Certainly it must be, unless the first decision of a principle of law by a State court is to be permanent and irrevocable. The idea seems to be, that the courts of a State are not to change their opinions; or, if they do, the first decision is to be regarded by this court as the law of the State. It is certain, if this be so, in the case before us, it is an exception to the



court as conforming to the State law derived from the earlier cases. Judge Nelson (19 How., 465) spoke of the State court as having, in like manner, "*placed the decision upon the temporary residence of the master*"—a view which does not seem justified by the language of the Opinions in *Dred Scott v. Emerson*; but, noticing the allegation that that decision was contrary to earlier cases in the same State, he concluded that, even if contrary to those cases, the decision in the particular case was to be taken as the best exponent of the existing law.

But, waiving the benefit of this ground, Judge Nelson justified the decision of the State court as in conformity with the then existing law. In his argument, the judge illustrates the mistake, so often made in cases of this international character, of supposing that the decisions of other States and other countries may be followed in such cases by the courts of any one State, though the earlier decisions of the same State should afford a contrary rule of decision. Judge Nelson refers to a Missouri case as being directly contrary (probably *Rachel v.*

rule governing this court in all other cases. But what court has not changed its opinions? What judge has not changed his?

"Waiving, however, this view, and turning to the decisions of the courts of Missouri, it will be found that there is no discrepancy between the earlier and the present cases upon this subject. There are some eight of them reported previous to the decision in the case before us, which was decided in 1852. The last of the earlier cases was decided in 1836. In each one of these, with two exceptions, the master or mistress removed into the free State with the slave, with a view to a permanent residence—in other words, to make that his or her domicile. And, in several of the cases, this removal and permanent residence were relied on as the ground of the decision in favor of the plaintiff. All these cases, therefore, are not necessarily in conflict with the decision in the case before us, but consistent with it. In one of the two excepted cases the master had hired the slave in the State of Illinois from 1817 to 1825. In the other, the master was an officer in the army, and removed with his slave to the military post of Fort Snelling, and at Prairie du Chien, in Michigan, temporarily, while acting under the orders of his Government. It is conceded the decision in this case was departed from in the case before us, and in those that have followed it. But it is to be observed that these subsequent cases are in conformity with those in all the slave States bordering on the free—in Kentucky (2 Marsh., 476; 5 B. Munroe, 176; 9 ib., 565); in Virginia (1 Rand., 15; 1 Leigh, 172; 10 Grattan, 495); in Maryland (4 Harris and McHenry, 295, 322, 325). In conformity, also, with the law of England on this subject, *ex parte Grace* (2 Hagg. Adm. R., 94), and with the opinions of the most eminent jurists of the country. (Story's Conf., 396 a; 2 Kent Com., 258 n.; 18 Pick., 193, Chief Justice Shaw. See Corresp. between Lord Stowell and Judge Story, 1 vol. Life of Story, p. 552, 558.)"

"The State of Louisiana, whose courts had gone further in holding the slave free on his return from a residence in a free State than the courts of her sister States, has settled the law, by an act of her Legislature, in conformity with the law of the court of Missouri in the case before us. (Sess. Law, 1846.)"

Walker, in 1836, 4 Missouri, 350, in which it was decided that a slave carried by her owner, an officer in the army, to his station in the Northwest Territory, was to be held free on returning to Missouri); yet he justifies the decision in *Dred Scott v. Emerson* as agreeing with certain cases in "the States bordering on the free," and with the decision of Lord Stowell. Why the cases in States not so bordering should be excluded in the deduction of a general rule, does not appear. It may be questioned whether even the cases cited will support the doctrine that a residence, like that of the parties in this case, in a jurisdiction wherein all persons are regarded as free, will not cause the slave to be recognized as free on returning to the slave State. It may be very confidently asserted that the doctrine is not maintained by the numerous other cases which have here been cited. Judge Nelson also refers to the statute of Louisiana. But this is only additional proof that the common or unwritten law was to the contrary; and it was a rule of this character, if any, which was to be gathered from the jurisprudence of the other slaveholding States. Has a statute of Louisiana power to change the common law of Missouri?

Mr. Justice Grier said (ib., 469), "I concur in the Opinion delivered by Mr. Justice Nelson on the questions discussed by him."

§ 973. Mr. Justice Daniel, in his brief examination of this question of international law (ib., 483-487), argues as if the point were, whether the law of the State of Missouri should be supplanted by the law of some other jurisdiction as having intrinsic force in that State; and, holding that the law determining the rights of the parties as inhabitants of Missouri must rest solely on the juridical will of that State, at once concludes that the law of Missouri did not recognize the right of freedom given in the non-slaveholding jurisdiction. The argument is imperfect. There could be no question that the rule for this case was part of the law of Missouri; but then it remained to determine what that law was. Judge Daniel, without giving any attention to the earlier decisions of Missouri courts, relies upon Lord Stowell's decision in the case



of the slave Grace, and on the early Virginia case, *Lewis v. Fullerton*.<sup>1</sup>

§ 974. Mr. Justice Campbell's Opinion bearing on this point is substantially like Judge Nelson's. He states the question, *ib.*, 494, as being, "whether the manumission of the slave is effected by his removal, with the consent of the master, to a community where the law of slavery does not exist, in a case where neither the master nor slave discloses a purpose to remain permanently, and where both parties have continued to maintain their existing relations. What is the law of Missouri in such a case?" Judge Campbell then cites several decisions, miscellaneous, of different States, including Missouri. He says, *ib.*, 495, "absence in the performance of military duty, without more, is a fact of no importance in determining a question of change of domicile." Thus, holding that the parties never had any other domicile than Missouri, Judge Campbell applies the general rule and decides that the plaintiffs were not free by the law of Missouri.<sup>2</sup>

Mr. Justice Catron did not examine this point of the case in his Opinion.

<sup>1</sup> In this case the main question was, whether a contract, made in Ohio, for emancipation to be executed in Virginia could be enforced, when not in conformity with the Virginia law of emancipation. Lord Stowell's judgment in *Ex parte Grace*, 2 Hagg. Adm., 94, is so constantly cited in these cases that its real bearing should be noticed. The woman was seized by the customs-officer at Antigua, in 1825, "as forfeited to the King on suggestion of having been illegally imported in 1823," when she returned from England, with the mistress whom she had accompanied thither in 1822. Her former owner simply denied that she was a slave so illegally imported. The allegation in the 5th count, that she was brought in as a free person, and Lord Stowell's unfounded assumption that she had appealed to the law (*ib.*, 99, 100), were contradictory to the libel. If the woman came back a free person, she was not imported as a slave. Supposing her to have been a slave, the question was whether, under the circumstances, she was imported in violation of any statute? The colonial court and Lord Stowell decided that she was not; decreeing "that she be restored to the claimant, with costs and damages for her detention." As between the woman and the claimant in this case, her status could not be decided by this judgment. (An American case very similar is *U. S. v. The Garonne, &c.*, 7 Peters, 72.)

<sup>2</sup> After this conclusion Judge Campbell, *ib.*, 495-500, controverts the general rule of international private law as to the non-continuance of slavery in these cases in the non-slaveholding jurisdiction, as exhibited in *Somerset's case*, the European authorities, and the decisions of the free States (*ante*, § 308), and seems to maintain that the status of slavery continues in the non-slaveholding forum at the option of the master, until he may choose to adopt a permanent domicile. (Compare *ante*, § 530.)

§ 975. Justices McLean and Curtis dissented on this question from the Opinion of the Court.

Judge McLean, in his Opinion, under the fifth head (*ib.*, 557-563), reviewed the cases and held that the decision of the Missouri court was contrary to the law of that State as exhibited in its earlier decisions, as well as to the general rule deducible from the decisions in other States.<sup>1</sup> He further held (*ib.*, 563) that the Supreme Court might reverse a decision of a State court founded on an erroneous exposition of the law of the State.<sup>2</sup>

§ 976. Mr. Justice Curtis<sup>2</sup> examined this question at much length (*ib.*, 594-604), holding that Dr. Emerson had such a residence in the Wisconsin Territory as was sufficient to give a status of freedom to the plaintiff, Dred Scott; that Emerson had allowed him to contract marriage with the woman whom he had also brought there, and had thereby recognized their capacity to contract, to sustain the obligations of husband and wife, while the child born to them there could have no other domicile; that the Missouri court had recognized the sufficiency of the facts in the case to confer freedom in the non-slaveholding forum, and had not, as was supposed by Judges Taney, Nelson, and Campbell, regarded the plaintiffs as only temporarily located in such jurisdiction; that the judgment of the State court was confessedly contrary to the law of Missouri and the general international private law as derived from the decisions, and that in such case it was competent for the Supreme Court of the United States to overrule it.

<sup>1</sup> Judge McLean (*ib.*, 558, 559) objected to the decision of the Missouri court as derogatory to the independent power of the State of Illinois in respect to the status of persons. Such considerations are founded on a misapprehension of the nature of international private law very similar to that exhibited in the language of the Missouri court. The misconception is intimately connected with the fatal notion that the States are capable of relations towards each other under international public law, and this again is derived from the false idea of State sovereignty.

<sup>2</sup> 19 Howard, 594: "But it is a distinct question, whether the law of Missouri recognized and allowed effect to the change wrought in the *status* of the plaintiff, by force of the laws of the Territory of Wisconsin.

"I say the law of Missouri, because a judicial tribunal, in one state or nation, can recognize personal rights acquired by force of the law of any other state or nation, only so far as it is the law of the former state that those rights should be recognized. But, in the absence of positive law to the contrary, the will of every civilized state must be presumed to be to allow such effect to foreign laws as is in



The language of Judge Curtis, in the statement of general principles and of the conclusions afforded by their application to the facts of this case, is more in harmony with the views taken in the elementary portion of this work, than are the expressions employed by the other members of the court. The

accordance with the settled rules of international law. And legal tribunals are bound to act on this presumption. It may be assumed that the motive of the state in allowing such operation to foreign laws is what has been termed comity. But, as has justly been said (per Chief Justice Taney, 13 Pet., 589), it is the comity of the state, not of the court. The judges have nothing to do with the motive of the state. Their duty is simply to ascertain and give effect to its will. And when it is found by them that its will to depart from a rule of international law has not been manifested by the state, they are bound to assume that its will is to give effect to it. Undoubtedly, every sovereign state may refuse to recognize a change, wrought by the law of a foreign state, on the *status* of a person, while within such foreign state, even in cases where the rules of international law require that recognition. Its will to refuse such recognition may be manifested by what we term statute law, or by the customary law of the state. It is within the province of its judicial tribunals to inquire and adjudge whether it appears, from the statute or customary law of the state, to be the will of the state to refuse to recognize such changes of *status* by force of foreign law as the rules of the law of nations require to be recognized. But, in my opinion, it is not within the province of any judicial tribunal to refuse such recognition from any political considerations, or any view it may take of the exterior political relations between the state and one or more foreign states, or any impressions it may have that a change of foreign opinion and action on the subject of slavery may afford a reason why the state should change its own action. To understand and give just effect to such considerations, and to change the action of the state in consequence of them, are functions of diplomatists and legislators, not of judges.

"The inquiry to be made on this part of the case is, therefore, whether the State of Missouri has, by its statute, or its customary law, manifested its will to displace any rule of international law, applicable to a change of the *status* of a slave, by foreign law. I have not heard it suggested that there was any statute of the State of Missouri bearing on this question. The customary law of Missouri is the common law, introduced by statute in 1816. (1 Ter. Laws, 436.) And the common law, as Blackstone says (4 Com., 67), adopts, in its full extent, the law of nations, and holds it to be a part of the law of the land. I know of no sufficient warrant for declaring that any rule of international law, concerning the recognition, in that State, of a change of *status*, wrought by an extra-territorial law, has been displaced or varied by the will of the State of Missouri. I proceed then to inquire what the rules of international law prescribe concerning the change of *status* of the plaintiff wrought by the law of the Territory of Wisconsin.

"It is generally agreed by writers upon international law, and the rule has been judicially applied in a great number of cases, that wherever any question may arise concerning the *status* of a person, it must be determined according to that law which has next previously rightfully operated on and fixed that *status*. And, further, that the laws of a country do not rightfully operate upon and fix the *status* of persons who are within its limits *in itinere*, or who are abiding there for definite temporary purposes, as for health, curiosity, or occasional business; that these laws, known to writers on public and private international law as personal statutes, operate only on the inhabitants of the country. Not that it is or can be denied that each independent nation may, if it thinks fit, apply them to all persons within their limits. But when this is done, not in conformity with the principles of international law, other states are not understood to be willing to recognize or allow effect to such applications of personal statutes."

On p. 601 of the Report, Judge Curtis says: "To avoid misapprehension on this

portions of the Opinion particularly referred to are given in the note.

§ 977. The question whether the national judiciary must accept the decision of the State court, on the facts in the particular case, as the authoritative exposition of the law of the State

important and difficult subject, I will state, distinctly, the conclusions at which I have arrived. They are—

"*First.* The rules of international law respecting the emancipation of slaves, by the rightful operation of the laws of another State or country upon the *status* of the slave, while resident in such foreign State or country, are part of the common law of Missouri, and have not been abrogated by any statute law of that State.

"*Second.* The laws of the United States, constitutionally enacted, which operated directly on and changed the *status* of a slave coming into the Territory of Wisconsin with his master, who went thither to reside for an indefinite length of time, in the performance of his duties as an officer of the United States, had a rightful operation on the *status* of the slave, and it is in conformity with the rules of international law that this change of *status* should be recognized everywhere.

"*Third.* The laws of the United States, in operation in the Territory of Wisconsin at the time of the plaintiff's residence there, did act directly on the *status* of the plaintiff, and change his *status* to that of a free man.

"*Fourth.* The plaintiff and his wife were capable of contracting, and, with the consent of Dr. Emerson, did contract, a marriage in that Territory, valid under its laws; and the validity of this marriage cannot be questioned in Missouri, save by showing that it was in fraud of the laws of that State, or of some right derived from them; which cannot be shown in this case, because the master consented to it.

"*Fifth.* That the consent of the master that his slave, residing in a country which does not tolerate slavery, may enter into a lawful contract of marriage, attended with the civil rights and duties which belong to that condition, is an effectual act of emancipation. And the law does not enable Dr. Emerson, or any one claiming under him, to assert a title to the married persons as slaves, and thus destroy the obligation of the contract of marriage, and bastardize their issue, and reduce them to slavery.

"But it is insisted that the Supreme Court of Missouri has settled this case by its decision in *Scott v. Emerson* (15 Missouri Reports, 576); and that this decision is in conformity with the weight of authority elsewhere, and with sound principles. If the Supreme Court of Missouri had placed its decision on the ground that it appeared Dr. Emerson never became domiciled in the Territory, and so its laws could not rightfully operate on him and his slave; and the facts that he went there to reside indefinitely, as an officer of the United States, and that the plaintiff was lawfully married there, with Dr. Emerson's consent, were left out of view, the decision would find support in other cases, and I might not be prepared to deny its correctness. But the decision is not rested on this ground. The domicile of Dr. Emerson in that Territory is not questioned in that decision; and it is placed on a broad denial of the operation, in Missouri, of the law of any foreign State or country upon the *status* of a slave, going with his master from Missouri into such foreign State or country, even though they went thither to become, and actually became, permanent inhabitants of such foreign State or country, the laws whereof acted directly on the *status* of the slave, and changed his *status* to that of a freeman.

"To the correctness of such a decision I cannot assent. In my judgment, the opinion of the majority of the court in that case is in conflict with its previous decisions, with a great weight of judicial authority in other slaveholding States, and with fundamental principles of private international law. Mr. Chief Justice Gamble, in his dissenting opinion in that case, said: ' &c.



affecting the rights of the parties, has been already noticed, *ante*, Vol. I., p. 490, n. 2. If the case is one of those in which the rights and obligations of the parties, though *ascertained* according to the State law, are *maintained* under the *quasi*-international law which derives its authority from the Constitution of the United States, the national judiciary must ascertain the State law without reference to the judgment of the State court on the same facts. Otherwise, though that judgment would be appealable to the Supreme Court of the United States as a case arising under the Constitution of the United States, the appeal would be nugatory.

But the case may be one in which the rights and obligations of the parties are not maintained by any provision in the Constitution, though coming within the judicial power of the United States as a case between certain persons. In such a case it would seem that the decision of the State court as to the State law in the particular case must be conclusive. The case of *Dred Scott v. Sandford*, if within the judicial power of the United States, was one of this character, having been brought in the Circuit Court by Scott as a citizen of Missouri against Sandford as a citizen of New York, and not as a case arising under the Constitution and laws of the United States.

The opinion of Judges Taney and Nelson, as to the force of the decision of the Missouri court as the exposition of the law of Missouri, may be sustained by this distinction.

§ 978. A variety of circumstances may be conceived in which the determination of the rights and obligations of private persons incident to conditions of freedom and its contraries would present other questions under that branch of the domestic international private law of the United States which is considered in this chapter. These for the most part might be classed under the law of contract and testamentary dispositions. No questions of this class have hitherto excited particular attention.<sup>1</sup>

<sup>1</sup> In connection with this section, see *ante*, in the close of Ch. X., §§ 323, 327.

## CHAPTER XXXII.

THE FOREIGN INTERNATIONAL PRIVATE LAW OF THE UNITED STATES.  
OF NATURALIZATION. OF STATUS OF FOREIGN ALIENS. OF THE  
IMPORTATION OF SLAVES, AS TRADE AND AS CRIME. OF THE DE-  
MAND AND EXTRADITION OF SLAVES AND CRIMINALS UNDER  
THE GENERAL INTERNATIONAL LAW.

§ 979. After considering conditions of freedom and its contraries as topics of the domestic international law, it remains to consider such conditions as they may be affected by the foreign international law of the United States which applies to persons distinguished as foreign aliens.<sup>1</sup> Under this branch of the general subject only a few principal objects of inquiry can here be briefly alluded to.

§ 980. On general principles, the law of the colonies applying to foreign aliens continued in the new States after the Revolution, modified only by the political change whereby the subjects of Great Britain became aliens in respect to the United States. The Constitution of the United States contains no provisions which directly determine any relations of foreign aliens. The rights and obligations incident to the status or personal condition of such persons depend upon the powers held by the States, except as those granted to the several departments of the national Government become a source of law affecting such persons.<sup>2</sup>

§ 981. The question as to the extent of the power "to establish a uniform rule of naturalization," has already been noticed. The existing Acts of Congress mention only "aliens being free white persons" as those who may acquire citizenship

<sup>1</sup> *Ante*, §§ 384, 387, 599, and, generally, Chapters XIII. and XX.

<sup>2</sup> *Ante*, §§ 75, 330, 415, 434.



under them. The question, whether Congress may or may not naturalize others, may depend upon the degree of privilege which Congress can confer under this power.<sup>1</sup>

§ 982. If the status of the foreign alien can be affected by any other legal rule resting on the powers held by that Government, it must be through the grant of powers in reference to the external relations of the United States with foreign countries and their inhabitants. These relations may, in a measure, be distinguishable as those of war and those of peace. The powers of government incident to the first of these have no proper legal connection with the personal condition of private persons.<sup>2</sup>

§ 983. The power "to regulate commerce with foreign na-

<sup>1</sup> *Ante*, §§ 389-391, 627-630.

<sup>2</sup> In the existing civil crisis much is said of a "war power" in the exercise of which the slaves, in the States whose inhabitants are in armed opposition to the national Government, may be emancipated, at the discretion of those who, in those States, may have the supreme command of the national military force. Mr. J. Q. Adams, in a speech in the House of Representatives, April 14, 15, 1842, is said to have stated the existence of the power as a recognized doctrine of public law. In the event of any declaration of emancipation, in the exercise of such a power, and of an ensuing practical emancipation while the parties whose rights and obligations are to be affected by it are within the actual control of the military force from which the declaration proceeds, the question of the legal operation of such declaration may be supposed to arise at some time or other after the withdrawal of the military force, and whenever those rights and obligations shall be the subject of suits in the civil courts. It seems to be assumed, by those who assert the existence of the power and advocate its exercise in the revolting States, that the status of the slaves so emancipated will have been legally changed, as by ordinary emancipation by act of the owner, or by State legislation. This being supposed, and that the civil courts will, in the ordinary course of judicial decision, recognize the change of personal condition, the question occurs whether, by the same declaration of emancipation, a change in the location of power over the status of those thus emancipated will have occurred, so that the power to determine their condition as bond or free in the future will no longer be vested in the several State which they may inhabit, but pass to some other political person—the national Government, or some department or officer thereof, it may be assumed. In this case, the written Constitution will have ceased to indicate the line between the powers granted to the Government of the United States and those "reserved" to the States; and the further inquiry naturally follows, whether those thus emancipated will be the only persons whose personal condition will have been removed from the control of the State.—the personal condition of all others, of whatever color, being still subject to the State power.—or whether the entire power over status of persons will, in some of the States, have become one of the powers held by the national Government, and whether the change will affect the powers of all the States equally. The assertion of power to effect a permanent emancipation, whether it be claimed for a commander-in-chief, for Congress, or for the national Government as a whole, involves the inquiry—Will a new distribution of the powers of sovereignty in the hands of the people of the United States by revolutionary change now take place? By sec. 4 of the Act of Aug. 6, 1861, *An Act*

tions," given to Congress in Art. I., sec. 8, must enable the national Government, in some degree, to maintain, in time of peace, the rights and obligations incident to the status of foreign aliens. Any power in respect to the admission or exclusion of such persons must be derived, apparently, from this power,<sup>1</sup> or from the treaty-making power vested in the President and Senate by Art. II., sec. 2. The limitation in Art. I., sec. 9,—“The migration or importation of such persons as any of the States now existing shall think proper to admit shall not be prohibited by the Congress prior to the year eighteen hundred and eight; but a tax or duty may be imposed on such importation, not exceeding ten dollars for each person.”—seems to indicate that the power would, in its absence, have belonged to Congress, even before the expiration of the prohibition. But this clause, interpreted on the principle of learning the intention *aliunde*, and the rule of *contemporanea expositio*, has always been taken to give a special power in respect to the importation of slaves from Africa. Congress has passed various Acts to prevent it.

§ 984. The status of foreign aliens, in relations not affected by the powers above spoken of, appears to be determinable according to the law of the State in which they may appear; though, from the character of the persons, the judicial power of the United States may be invoked to decide on the nature of their rights and obligations.<sup>2</sup> The law determining their condition is international private law, from the character of the parties; but, being derived from the State powers, it may

*to confiscate property used for insurrectionary purposes*, XII. St. U. S., 319, any one who “during the present insurrection against the Government of the United States” shall require or permit persons owing him “labor or service under the laws of any State,” to serve in military operations against the Government, “shall forfeit his claim to such labor, any law of the State, or of the United States, to the contrary notwithstanding. And whenever thereafter the person claiming such labor or service shall seek to enforce his claim, it shall be a full and sufficient answer to such claim that the person whose service and labor is claimed had been employed in hostile service against the Government of the United States, contrary to the provisions of this Act.”

<sup>1</sup> Compare Judge Baldwin, noted *ante*, p. 766.

<sup>2</sup> *Ante*, § 445. The question—By what law the status of persons on board of private or public vessels of the United States when not within the jurisdiction of any several State or Territory, is to be determined—may be of importance under many supposable circumstances. Compare *ante*, p. 770, note 2, and see *Polydore v. Prince*, Ware's R., 410, U. S. v. *The Amistad*, 15 Peters, 518.



be very different in the different States. How far the power of the States in respect to the rights and obligations of foreign aliens may be limited by the effect of treaties with foreign nations, is a question which might be important.

§ 985. The power to determine the relations of persons on board of private ships and vessels belonging to the United States on the high seas, or in places not under the territorial jurisdiction of any civilized nationality or power, gives existence to a class of laws having personal, as contradistinguished from territorial, extent.<sup>1</sup> These laws, so far as they apply to persons without regard to their nationality, place of birth, or naturalization, are properly part of the internal law of the United States, as distinguished from the international, law,<sup>2</sup> though they may be very important in connection with the relations of the United States towards other countries. The powers of Congress to originate such laws are derived partly from the power in respect to commerce, and partly from the power given in Art. I., sec. 8, "to define and punish piracies and felonies committed on the high seas, and offences against the law of nations." The laws punishing persons engaged in the slave trade between foreign countries, or in buying or in seizing persons for slaves on the coasts of Africa, or on the high seas, may here be classed; while, as incidental to these powers, and to the power to prohibit the importation of persons, may be classed the laws against equipping vessels in ports of the United States with the intention of engaging in the African slave trade.<sup>3</sup>

§ 986. The power to remove persons to foreign countries, or to colonize them in barbarous and unoccupied countries, or

<sup>1</sup> *Ante*, §§ 26, 27.

<sup>2</sup> *Ante*, § 53.

<sup>3</sup> Laws of Congress relating to the external slave trade are: Acts of March 22, 1794, *An Act to prohibit the carrying on the slave trade from the United States to any foreign place or country*, I. St., U. S., 347; of May 10, 1800, *An Act in addition, &c.* (to the above Act), II. ib., 70; of March 2, 1807, *An Act to prohibit the importation of slaves into any port or place within the jurisdiction of the United States, from and after the first day of January, in the year of our Lord one thousand eight hundred and eight*, ib., 426; of April 20, 1818, *An Act in addition to, &c.* (the last-named Act), and to repeal certain parts of the same, III. ib., 450; of March 3, 1819, *An Act in addition to the Acts prohibiting the slave trade*, ib., 532; and also of May 15, 1820, *An Act to continue in force "An Act to protect the commerce of the United States and punish the crime of piracy," and also to make further provisions for punishing the crime of piracy*, ib., 600.

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